93-45

Supreme Court, U.S.
FILED
JUL 2 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the VISION INTERFAITH SATELLITE NETWORK and ATLANTA INTERFAITH BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM 3-JUDGE COURT
UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

JOINT JURISDICTIONAL STATEMENT

STEVEN J. HYMAN
Counsel of Record
ROBERT I. FREEDMAN
JANET C. NESCHIS
PAUL H. LEVINSON
LEAVY, ROSENSWEIG & HYMAN
Counsel for Appellant
National Interfaith
Cable Coalition, Inc.
11 East 44th Street
New York, New York 10017
(212) 983-0400

JAMES H. JOHNSTON
Counsel for Appellant
Atlanta Interfaith
Broadcasters, Inc.
Suite 1000
1133 Connecticut
Avenue NW
Washington, D.C. 20036
(202) 659-1911

QUESTIONS PRESENTED

1. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment as creating an impermissible government subsidy to religion when local off-air stations which will be required to be carried under the Act will be religious broadcasters disseminating a sectarian message.

2. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment when the Act will deny equal access to religious cable programmers to the cable medium while mandating the carriage of local religious broadcast stations, where the denial of such

carriage will be by reason of appellants' message.

3. Whether the must-carry provisions of the Cable Act of 1992 violate the Establishment and Free Exercise Clauses of the First Amendment when the Act coerces the private cable operator to carry and disseminate a religious message and may be perceived by the viewing public as an endorsement of such a message.

List of Parties to the Proceeding Below[1]

Appellants

National Interfaith Cable Coalition, Inc.
Atlanta Interfaith Broadcasters, Inc.

Appellees

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services

---

1 The three-judge court granted all motions to intervene in this proceeding. Accordingly, the intervenors have been grouped as plaintiffs or defendants as appropriate.

International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation
National Cable Television Association, Inc.
QVC Network
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

In The
Supreme Court of the United States

October Term, 1993

NATIONAL INTERFAITH CABLE COALITION, INC. Operating as the VISION INTERFAITH SATELLITE NETWORK and ATLANTA INTERFAITH BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM 3-JUDGE COURT
UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants, NATIONAL INTERFAITH CABLE COALITION, INC. ("NICC") operating as the VISION INTERFAITH SATELLITE NETWORK ("VISN") and ATLANTA INTERFAITH BROADCASTERS, INC. ("AIB"),[2] intervenor-plaintiffs

---

2 Neither NICC nor AIB has any affiliates, parents or subsidiaries.

below, appeal from the judgment of the three-judge district court[3] upholding the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, (the "Cable Act")[4] 47 U.S.C. §§ 534 and 535, as not violative of the First Amendment. Appellants NICC and AIB join with the other appellants from the decision below, as identified infra, which are filing a separate jurisdictional statement and which raise issues under the Freedom of Speech and Freedom of the Press Clauses to the First Amendment which are equally applicable

---

3 The Notices of Appeal of NICC and AIB are annexed hereto in the Appendix to the Jurisdictional Statement of Appellants at pages A-1 to A-2 and B-1, respectively (hereinafter "J.S. App. _____") filed with this Court.

4 47 U.S.C. §§ 531 et seq.

to NICC and AIB.[5] However, NICC and AIB are unique as religious programmers, and for this reason separately appeal on the grounds that the must-carry provisions violate their rights under the Establishment and Free Exercise Clauses of the First Amendment as well.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia, is reported at 819 F. Supp. 32. J.S. App. C-1 to E-22.

JURISDICTION

The judgment of the district court was entered on April 12, 1993. Timely

---

5 To the extent they are applicable herein, appellants adopt and incorporate the discussion of background facts by the other appellants as to both the cable industry and the history of "must-carry."

Notices of Appeal were filed in the district court and in this Court on May 3, 1993 by appellants NICC and AIB. J.S. App. A-1 to A-2, B-1.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying...an interlocutory or permanent injunction in any civil action....required by any Act of Congress to be heard and determined by a district of three judges." Section 23 of the Cable Act, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The provisions of the Cable Television Consumer Protection and Competition Act of 1992 which are the subject of this appeal are 47 U.S.C. §§534 and 535. J.S. App. F-1 to F-22.

STATEMENT OF CASE

Appellants NICC and AIB were granted leave to intervene in this

action,[6] which was brought by the TURNER BROADCASTING SYSTEM, INC. and consolidated with other cases brought by cable systems and other suppliers of programming forceable systems (the "other appellants") before a three-judge district court seeking to enjoin enforcement of various provisions of the Cable Act, and specifically, the Act's so-called must-carry provisions, 47 U.S.C. §§ 534, 535, mandating that cable systems carry the programming of local broadcast stations.

The other appellants challenged the constitutionality of the statute under the Speech and Press Clauses of the First Amendment. NICC and AIB

---

6 NICC and AIB were treated as amicus curiae during the proceedings below, but were granted intervenor status in the final judgment.

intervened to raise the additional claims that the must-carry provisions impermissibly abridged their rights under the First Amendment's Establishment and Free Exercise Clauses. The district court, by a 2-1 vote, upheld the challenged provisions.

THE APPELLANTS NICC AND AIB

NICC, a not-for-profit Maryland-chartered corporation, is a consortium of more than fifty (50) national faith groups, including, *inter alia*, representatives of most Protestant denominations, Catholic, Jewish, Mormon, Unitarian, Mennonite and Eastern Orthodox groups, as well as The Salvation Army, The National Council of Churches, and The Christian Holiness Association. Its diverse member faith groups represent more than 200,000 congregations with over

112,000,000 members throughout the nation.

NICC created a cable television network called VISN which began transmission in September 1988 and which continues to transmit twenty-four hours daily via satellite on a shared-channel basis,[7] delivering a broad-based faith and values programming service nationwide. VISN can only be viewed by subscribers of cable systems that enter into a carriage agreement with VISN, and it competes for carriage with other cable program services, such as CNN, TNT, The

---

7 Since October, 1992 VISN has operated pursuant to a channel-sharing agreement with the American Christian Television System ("ACTS"), which is owned by the Southern Baptist Radio and TV Commission. The combined channel, VISN-ACTS, now reaches nearly 20 million households on more than 1,080 cable systems.

Discovery Channel and numerous other cable networks, as well as with off-air broadcast stations. At least three other religious satellite networks seek carriage on cable systems.

VISN is paid fees by cable systems that elect to carry it, and it can only remain competitive with other cable programmers and continue operating if it can obtain carriage on enough cable systems to provide a sufficient revenue base. As distinguished from competing religious stations and networks, VISN (a) refrains from on-air solicitation of funds, (b) strictly forbids proselytizing, and (c) does not attack or criticize other faith groups.

AIB is a small Georgia nonprofit corporation, with four full time employees, that delivers, without charge, interfaith and local public

service programming via microwave to eleven cable television systems in the Atlanta metropolitan area. Its twenty-four hour per day channel reaches 500,000 households. Interfaith programming is submitted by many of the 1,200 Protestant, Catholic, Jewish, and Moslem congregations in Atlanta that are members. Like VISN, AIB does not allow on-air fundraising or criticism of faiths. Typical of its religious offerings are weekly services from local churches. AIB's revenue comes from fees for programming time ranging from $170 to $300 per hour. This compares to a $4,000 per hour charge by a commercial station in Atlanta. Because AIB uses microwave, it is not a "broadcast" station eligible for must-carry status under the Cable Act, nor has it been considered a "public,

educational, or governmental" channel. Unlike broadcast television signals, AIB's microwave signals cannot be received by conventional television sets, except through cable or with special equipment.

FACTUAL BACKGROUND

The Directory of Religious Broadcasting indicates that 350 full power and low power commercial stations carry religious programming on a full or part time basis ("local religious broadcast stations"). As of November 1992, there were 1,144 full power commercial stations and 1,291 low power stations licensed in the United States. The so-called "independent" stations, which are not affiliated with networks, are the most likely beneficiaries of must-carry. Of the 292 independent, full power commercial

stations, 74 present primarily religious programming.

Typical of the local religious broadcast stations are those owned by or affiliated with Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network ("TBN"), which participated below as an intervenor-defendant. TBN is a religious institution and is classified by the Internal Revenue Service as a "church". TBN refers to its stations as "churches of the air", and its station managers are ordained as "ministers" of the church.

TBN owns twelve commercial television stations as well as 94 low power television permits, and is under common ownership with affiliates owning at least ten other broadcast stations, as well as other media outlets,

including a satellite network that competes with VISN. TBN's satellite network, composed of more than 285 stations, transmits evangelical[8] and charismatic programming fare on a twenty-four hour basis. In contrast to VISN and AIB, TBN engages extensively in on-air fundraising, and its schedule includes numerous programs featuring individual ministers and pastors who engage in fundamentalist and/or

---

8 TBN's evangelical approach, as well as its overt interest in the statute at issue, as discussed infra, is exemplified by its January 1993 newsletter to members: "Pray that the new cable TV law, just passed by Congress late last year, will stand the court challenges ... . Pray that doors will continue to burst open around the world to Christian TV as we have seen so dramatically these past few years. The Moslem strongholds of the Middle East and elsewhere are the last remaining areas still closed to the Gospel. We command them to open, in Jesus' name."

evangelical preaching and on-air solicitation of funds for their ministries.

In many of the communities where VISN and/or AIB are carried or seek to be carried on the local cable system, there are one or more local religious broadcast stations, such as WHSG-TV in Monroe, Georgia, an FCC licensee affiliated with TBN, with which the appellant interfaith programmers must compete for both audience and carriage on the Atlanta cable system.

Prior to enactment of the Cable Act, VISN, AIB and the local religious broadcast stations had equal access to the local cable system. The cable operator, after consideration of community needs and interests, determined whether or not to carry VISN, AIB and/or the local religious

broadcast stations on the local cable system, without any interference from any statutory provision or governmental authority. Prior to must-carry, almost without exception, the local religious broadcast stations were excluded from cable.

For example, prior to enactment of the Cable Act, Dimension Cable ("Dimension"), the local cable system operator in San Diego County, California, elected to carry VISN, while removing TBN from carriage. Although Dimension chose to add VISN to its programming because, as its station manager confirmed, it determined that "VISN best meets the needs of the vast majority of our customers," a supporter of TBN thereafter brought a series of thus far unsuccessful legal actions seeking to compel Dimension to return

TBN to its lineup.

Because of their inability to obtain carriage on local cable systems, the local religious broadcast stations and TBN campaigned to influence Congress to enact the Cable Act, and particularly, the must-carry provisions.[9] Following initial Congressional passage of the Cable Act, local religious broadcast stations mobilized their members in support of the bill, running advertisements

---

9 For example, noncommercial religious stations are not eligible for must-carry as noncommercial stations under 47 U.S.C. §535(l)(1) because it only applies to stations that can qualify for government grants, and sectarian programming does not qualify under 15 CFR §2301.1. The must-carry rights of commercial stations are more inclusive. Religious broadcasters lobbied Congress with the result that under 47 U.S.C. §534(h)(1) noncommercial religious stations have the enhanced must-carry rights of commercial stations.

requesting their viewers to write to the President and Congress in support of the bill. In a letter to the President shortly before his veto, the religious broadcasters' association, the National Religious Broadcasters, wrote that "[c]arriage of local Christian stations by cable is essential if many stations are to survive" and "a veto of this bill would threaten the future" of such stations.

By reason of must-carry, cable systems will be required to carry virtually every local religious broadcast station, such as TBN's television affiliates in San Diego and Atlanta, which, but for the Cable Act, would not be carried on the local cable systems.

The deleterious impact of must-carry has already been felt by

VISN and AIB. Since local cable systems have limited capacity, they have either been unable or have chosen not to allocate channel space to both the local religious broadcast stations and VISN, AIB and the other religious networks. Thus, as a result of the advent of must-carry, commencing in October, 1992 and continuing thereafter through February, 1993 (at the time the motion for summary judgment was submitted to the Court below), VISN has lost carriage and/or has been advised it will lose carriage by local cable system operators throughout the country,[10] including communities in

---

10 In addition to its loss of carriage, by reason of must-carry, VISN is threatened with channel repositioning and tiering of levels of service by the largest nationwide cable systems operator,

(continued)

a Nevada (Las Vegas), Hawaii (Honolulu), California, Washington, Oregon, New Mexico, Utah, Missouri, Kansas, Illinois, West Virginia and Pennsylvania.[11]

As a religious programmer, AIB competes against VISN and against TBN's local outlet, WHSG-TV, from Monroe, Georgia, for space on local cable systems. Prior to the Cable Act, when

---

10 (cont) since must-carry requires local broadcasters to be placed in preferred channel. Such repositioning, which has already occurred in Dallas, will cause harm to VISN by moving it to a second tier of channels and placing local religious broadcast stations on the primary tier. This will mean far reduced viewership for VISN/ACTS.

11 Were VISN able to further develop the Record subsequent to the submission of the summary judgment motion to the Court below, it would show that many more cable systems have terminated VISN's carriage or will be denying VISN access to the system solely as a result of must-carry.

carriage of religious programming was in the sole discretion of the cable operator, eleven cable operators picked AIB to be the only religious channel on their systems. However, implementation of must-carry may cause AIB to be dropped to make room for the mandatory carriage of WHSG-TV.

The religious establishment effect is most clearly demonstrated by the fact that TBN and the local religious broadcast stations will, solely by reason of the Cable Act, gain access to cable systems and viewers of cable television in major media markets across the country. According to TBN, it estimates it will gain access to 10 million new households and 36 million new viewers.

THE DECISION BELOW

A divided three-judge district

court upheld the must-carry provisions against appellants' challenge under the Free Exercise and Establishment of Religion Clauses of the First Amendment. The district court applied the test this Court articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) and noted that even were it to find that the must-carry provisions disproportionately favor the speech of certain types of religious speakers over others, the provisions do not violate the Establishment Clause. J.S. App. E-27. In dissenting, United States Circuit Judge Stephen F. Williams based his determination that the Cable Act was unconstitutional on its abridgement of the Freedom of Speech and Press Clauses of the First Amendment and did not address the question of whether the must-carry

provisions also violate the Establishment and Free Exercise Clauses. See J.S. App. C-1 to C-22.

The district court rejected appellants' contentions that must-carry violates the Establishment Clause since it has the primary effect of impermissibly advancing the interests of the local religious broadcast stations and favoring those interests over those of VISN and AIB by expanding the local stations' access to cable systems and decreasing carriage for VISN and AIB. Rather, although it implicitly recognized that the mandatory carriage provisions may, in fact, confer certain advantages to some religious groups (such as TBN) over others, the district court characterized these consequences as

"'[i]ncidental' burdens and benefits" J.S. App. C-28.

Finally, the district court disregarded NICC's claim that the must-carry provisions violated the Free Exercise Clause "because they prevent NICC from effectively disseminating its religious message," J.S. App. C-29, concluding that even if NICC's contentions were true, "[a]ny burden imposed on NICC's religious practice" is "merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." J.S. App. C-29.

In his dissent, Judge Williams did not address appellants' arguments. Of significance to the religious arguments set forth below, Judge Williams did, however, recognize the subsidy aspect

of must-carry by pointing out that less intrusive mechanisms such as direct financial subsidies to broadcasters, were available. J.S. App. E-12 to E-13.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised in this appeal involve both the Speech and Press Clauses of the First Amendment as well as the Establishment and Free Exercise Clauses. While the other appellants effectively argue the substantial questions presented by the district court's judgment upholding must-carry under the Speech and Press Clauses, they do not address the other part of the First Amendment relevant to this appeal. Appellants NICC and AIB therefore join in and adopt for purposes of this jurisdictional statement the arguments of the other appellants, since they are applicable

to them as well. However, because appellants NICC and AIB were the only parties to raise below the impact of must-carry on the religion clauses of the First Amendment, it is that aspect of this appeal which is the subject of this jurisdictional statement.

Although the tension between must-carry and the Establishment Clause is not evident from the terms of the statute, this does not mean that its implementation is benign. What appears content-neutral and secular on its face will, in fact, have substantial and far-reaching consequences of government aid to religious broadcasting. Nor will these consequences be incidental or remote to the purpose and effect of the statute. The one broadcasting group that will benefit the most from

this legislation is the local religious off-air broadcast stations.

The constitutional issues raised by must-carry under the religion clauses of the First Amendment are unique, since they involve a form of government aid not previously accorded sectarian institutions. While the government aid is not a direct grant in the form of dollars, it is, in effect, a form of subsidy and it is a far more valuable and beneficial currency because it grants the religious broadcaster something money could not buy -- access to a cable system's television viewing audience in a prime channel location.

A corollary of this grant of privilege to the local religious broadcast station is the resultant denial of access to the cable religious program service. Where the cable

religious program service and local religious broadcaster previously competed for access to the cable system, such equal access has now been sacrificed on the altar of must-carry. Instead, cable program services such as appellants NICC and AIB will be denied access to the cable medium. Cable operators with finite channel capacity will not carry both the local religious broadcaster and the cable religious program service. Having been coerced under must-carry to carry one religious format, cable operators will use the discretion they still retain over the remaining channel capacity and will not carry other religious program services not mandated by Congress. Not only does this deny appellants equal access to the cable television audience, but by granting the local religious

broadcaster a favored status, must-carry has given a preference to one religious speaker over another.

In the context of must-carry, the coercion by act of Congress to require a cable operator to carry a religious station involves questions under both the Free Exercise and Establishment Clauses. Mandating that the operator pick up and carry religious speakers of the local religious broadcasters may be perceived by the television viewing public as an endorsement of such a program by the operator. Clearly, the appearance of government endorsement of religion is prohibited by the Constitution. Coercion of a private citizen to endorse a religious speaker by government fiat, makes it no more acceptable.

While must-carry creates unique problems under the religion clauses, it must nevertheless be scrutinized under the traditional and fundamental notions of constitutional law mandating the separation of Church and State. With must-carry, however, these constitutional imperatives are under serious attack. Government intervention will provide direct and invaluable aid to sectarian institutions to propagate their particular religious message.

1. This Court has long recognized that the Establishment Clause prohibits government aid to sectarian institutions where such aid will "advance the religious mission of the religious institution receiving aid." Bowen v. Kendrick, 487 U.S. 589, 611 (1988). Whether such aid is in the

form of a direct subsidy or some other form of assistance, it remains impermissible. See People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948), Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 783, n.39 (1973), Hunt v. McNair, 413 U.S. 734 (1973), Tilton v. Richardson, 403 U.S. 672 (1971) and School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). It is in this context that the benefit of must-carry to the local religious broadcaster must be evaluated.

Certainly, it cannot be disputed that where a local religious broadcaster not previously carried on the area's cable system will now be carried solely by reason of the Cable Act, such carriage is tantamount to

government aid. This mandated access to the cable systems by act of Congress is far more valuable to the broadcaster than the direct payment of funds.

The must-carry provisions were intended to provide a subsidy to the local broadcast stations by providing the stations with increased viewership and hence increased advertising revenues.[12] (S. Rep. No. 102-92, 102d Cong., 1st Sess. 59 (1991) reprinted in 1992 U.S.C.C.A.N. 1133, 1192). That this government subsidy was specifically intended to benefit religious stations and was not an incidental benefit is clear from the

---

12 That must-carry operates as a financial subsidy was recognized by Judge Williams in his dissent below, in which he observed that must-carry is in the nature of a subsidy and that a less intrusive mechanism would be direct financial subsidy to broadcasters. J.S. App. E-12 to E-13.

Act. Although religious broadcast stations are disqualified from receipt of public broadcast funds under the regulations governing public broadcasting, the Cable Act makes no such distinction and includes all local religious broadcast stations as recipients of its benefits.

The inclusion of local religious broadcast stations in must-carry is not fortuitous, as the larger religious networks lobbied for must-carry and opposed its veto. As the religious broadcasters themselves succinctly stated in opposing President Bush's veto of the Cable Act:

> "Carriage of local Christian stations by cable is essential if many stations are to survive. Thus, veto of this bill could threaten the future of many religious broadcast stations."

The corollary of increased viewership is a far more valuable

currency than even the increased advertising revenues. By providing broader cable coverage and thus increased viewership to religious broadcasters, Congress is aiding the local religious broadcasters in the dissemination and promotion of their religious message. McCollum, 333 U.S. at 212. In fact, Congress expressly recognized that "[a] cable television system which carries the signal of a local religious broadcaster is assisting the broadcaster to increase its viewership..." 47 U.S.C. § 521(a)(15). One of the major religious broadcasters, TBN, has declared that, by reason of must-carry, TBN will be "connected to about ten million new households", and "thirty-six million potential new viewers", and that it will now have "access to about 80% of

the TV households of America." Through government coercion and mandate, the local religious broadcaster will, in fact, be granted a pulpit it could not otherwise obtain.

While all forms of aid to religious institutions are not invalid, aid which directly advances the sectarian institution's religious message, as it would here, is invalid. Zobrest v. Catalina Foothills School District, No. 92-94, 1993 WL 209636, *6 (U.S. 1993); Bowen, 487 U.S. at 609-610. Meek v. Pittinger, 421 U.S. 349, 366 (1975). In Zobrest, this Court reiterated that the state may not grant aid to a religious school, whether in funds or in kind, where the effect of the aid is "that of a direct subsidy to the religious school." 1993 WL 209636 at *6.

This Court has previously permitted

aid to sectarian institutions where it was merely an "attenuated" financial benefit. Thus, it has upheld generalized aid to a religious institution, such as providing it with police and fire protection or keeping its public sidewalks in good repair. Widmar v. Vincent, 454 U.S. 263, 274-275 (1981). So, too, it has upheld a form of aid which provides individuals with government funds to spend at institutions of their choice, including religious institutions, Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), or the ability of individuals to deduct expenses on their private tax returns. Mueller v. Allen, 463 U.S. 388 (1983). However, the aid given to the religious broadcast stations under must-carry is neither attenuated nor

indirect. Rather, it goes to the very heart of their purpose: to disseminate their message to as large an audience as possible.

The court below sought to avoid this problem by finding that must-carry was a secular statute and that the benefit to the religious broadcaster was merely incidental to such assistance. However, it is submitted that reliance on this narrow interpretation of Lemon, 403 U.S. at 612-613, is misplaced. Nor does this Court's reasoning in Zobrest offer any additional support. This Court has not held that a statute which gives such direct aid to the advancement of a religious mission can be "incidental" or "remote". See Wolman v. Walter, 433 U.S. 229, 250 (1977); Meek, 421 U.S. at 365. Even in Zobrest, the majority did

not just rely on the statute's apparent neutral and secular purpose. Rather, the majority found that the subsidy paid did not violate the Establishment Clause because this "neutral Government program" dispensed aid to the handicapped child and not the sectarian institution. 1993 WL 209636 at *7.

The apparent secular purpose of the must-carry legislation and the fact that on its face it may benefit a broad class of speakers does not mean that its application will not offend the Establishment Clause. In Bowen, 487 U.S. at 601-602, this Court reaffirmed the principle that a court is obligated to look beyond the language of the statute and determine whether its impact will be to advance or endorse sectarian messages and institutions.

This Court has always recognized

that an otherwise valid statute authorizing grants might be challenged on the ground that the award of a grant in a particular case would be impermissible, where the recipient of the grant does, in fact, possess sectarian characteristics. Bowen, 487 U.S. at 601; Hunt, 413 U.S. at 743; Tilton, 403 U.S. at 682. Further, where a statute is challenged with respect to a particular application, this Court has narrowed the focus of its inquiry as to primary effect and has stated that it must look only at the particular application at issue -- here, the mandated carriage of religious broadcast stations. Hunt, 413 U.S. at 743.

Certainly, the unique aspects presented by the mandatory carriage granted the religious broadcaster under

must-carry requires further review by this Court. It is not enough that the statute is apparently neutral on its face and is merely providing another medium for an FCC off-air broadcast licensee. The mandatory aspect of must-carry creates problems not previously encountered and changes the licensee into a government-supported entity with a right of access imposed by law. Where that entity is a religious broadcaster, serious questions are raised under the religion clauses of the First Amendment.

2. Must carry has created new issues under the Establishment and Free Exercise Clauses with regard to access of religious speakers to the cable viewing public. Because cable's capacity is limited, not everyone will have the opportunity to speak.

Nonetheless, Congress has defined a particular favored class, a class which specifically includes local religious broadcast stations, and has definitively mandated that the members of that class must be permitted to speak on cable. Because cable operators do not wish to carry multiple religious channels, a religious off-air broadcaster will now have access to the cable viewing audience, to the exclusion of the religious cable program service. Thus, where the local religious broadcasters are predominantly of one particular religious persuasion, the preference granted these broadcasters over the cable program service is all the more invidious.

The record is already clear that where a cable operator is required to

carry a local religious broadcast station, it will drop or refuse to add the religious cable program service. AIB believed that once must-carry was fully implemented, it would have no access to cable systems which will be required to carry the local TBN stations. So, too, NICC has been informed that where the local religious broadcast station must be carried, VISN will not be carried or will otherwise be placed in an inferior channel position.[13]

---

13 The evidence with regard to these issues has only been partially developed since the summary judgment motion by appellees cut off all discovery and any evidentiary hearings. If this Court were to reverse the judgment below and remand the case, the record would be more fully developed. Appellants are prepared to document further this adverse impact, since they continue to be dropped from cable systems as religious broadcast stations are added.

The reason for this adverse impact on AIB and NICC is not merely fortuitous or unintended. Cable operators will only carry a limited amount of religious programming. Certainly, commercial secular programming has the greater viewing audience and will get preferential space over either the religious off-air broadcaster, AIB or VISN. Where the religious off-air broadcaster has achieved access by operation of law, the religious cable program service not protected by law will lose out. This has already happened in Honolulu, California and Washington, and will continue to occur throughout the country as hundreds of religious off-air broadcast stations are added to their local cable system.

This Court has always protected the right of equal access to public forums. Widmar, 454 U.S. at 269 and more recently in Lambs Chapel v. Center Moriches Union Free School District, 1993 WL 187864, *3 (U.S.N.Y. 1993). Religious speakers are guaranteed the same rights of access to public forums as secular speakers. It remains fundamental constitutional law that access controlled by the government cannot be based upon the type of speech involved. Yet must-carry will alter these fundamental principles. Having changed how cable operators select their programming, must-carry will change the means of access for the benefit of the local religious broadcaster and to the detriment of the cable programmer. As a result, the religious message of the local

religious broadcaster will be heard, and appellants' voices may be permanently silenced.

The impact of must-carry is to change an essentially privately operated cable system into a public forum. See PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-87 (1980). The court below relied expressly on PruneYard for the proposition that private property may become a public forum. J.S. App. C-16, C-20, n. 24. However, the access to this new public forum is not equal for all speakers. Local religious broadcasters have guaranteed channel allocation in a preferred location, and all other cable programmers are left to seek a place on the remaining channel space. The cable operator will thus have discretion over fewer available channels, and its

choices will be circumscribed in conjunction with the type of broadcast stations it has been required to carry. With only limited channels available for religious programming, the local religious broadcast station will be given access as a matter of law, and other religious speakers such as VISN and AIB will not. Congress has made the choice, not the cable operator.

The problem of lack of equal access becomes even more pronounced because of the differing sectarian messages involved. The record already shows that the religious off-air broadcasters are primarily controlled by particular Christian evangelical sects. They offer a specific type of message. In contrast, VISN and AIB offer not a narrow sectarian message but present diverse religious views from many

different faith perspectives. As a result of must-carry, however, the latter may now have no television viewing audience since their only access to the public is through the cable system, and the former will have 100% of the television viewing audience -- i.e., off-air and cable. While such an occurrence might not have been envisioned by Congress, its impact is no less invidious.

3. The fact that Congress, by virtue of must-carry, has attempted to restrict the editorial discretion of cable operators is central to the arguments of the other appellants, and appellants NICC and AIB join in these arguments. However, these other appellants only argue the issues from a Free Speech perspective. While the Free Speech question is of central

concern to the validity of must-carry, it does not focus on the fundamental religious speech issues which are present as well.

Clearly, must-carry requires cable operators to carry religious speech whether they want to or not, and to carry specific religious speakers, yet this Court has consistently held that it is impermissible for the government to coerce a citizen to convey religious speech. Wooley v. Maynard, 430 U.S. 705, 713 (1977); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989). As Justice Kennedy observed in his separate opinion in County of Allegheny, this Court has "without exception... invalidated actions that further the interests of religion

through the coercive power of government." 492 U.S. at 660.

Nothing could be more coercive or compelling than the must-carry provisions, in that they require cable operators under penalty of law to deliver to their subscribers religious messages from religious speakers. Cable owners clearly object to these messages and speakers.

Governmental coercion of the cable operator to carry religious programming is all the more egregious because it may be perceived by the viewing public as an endorsement of such programming by the cable owner. When government sponsorship of a religious message may be perceived by the listener or viewer, the Court has refused to permit it to stand. County of Allegheny, 492 U.S. at 592-594; Lee v. Weisman, ____

U.S. _____, 112 S. Ct. 2649 (1992). This doctrine is applicable to the cable operator who is required to carry a religious speaker by operation of law. The cable operator may be perceived by the viewing audience as having endorsed the particular religious program, since it is being carried on its cable system. If such carriage of this program is due to government mandate, it is an impermissible imposition upon the rights of the cable operator.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

Steven J. Hyman
Counsel of Record
Robert I. Freedman
Janet C. Neschis
Paul H. Levinson
LEAVY ROSENSWEIG & HYMAN
Counsel for Appellant
National Interfaith Cable
Coalition, Inc.
Office and P.O. Address
11 East 44th Street
New York, New York 10017
(212) 983-0400

James H. Johnston
Counsel for Appellant
Atlanta Interfaith
Broadcasters, Inc.
1133 Connecticut Ave, N.W.
Suite 1000
Washington, D.C. 20036
(202) 659-1911

0063V

93-45 (2)

Court, U.S.
FILED
JUL 2 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC. Operating as the VISION INTERFAITH SATELLITE NETWORK and ATLANTA INTERFAITH BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM 3-JUDGE COURT
UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

APPENDIX

STEVEN J. HYMAN
Counsel of Record
ROBERT I. FREEDMAN
JANET C. NESCHIS
PAUL H. LEVINSON
LEAVY, ROSENSWEIG & HYMAN
Counsel for Appellant National Interfaith Cable Coalition, Inc.
11 East 44th Street
New York, New York 10017
(212) 983-0400

JAMES H. JOHNSTON
Counsel for Appellant Atlanta Interfaith Broadcasters, Inc.
Suite 1000
1133 Connecticut Avenue NW
Washington, D.C. 20036
(202) 659-1911

93 PP

APPENDIX
TABLE OF CONTENTS

	Page
Notice of Appeal, May 3, 1993 National Interfaith Cable Coalition	A-1
Notice of Appeal, May 3, 1993 Atlanta Interfaith Broadcasters, Inc.	B-1
Memorandum and Order of the United States District Court (Three-Judge Court), filed April 8, 1993, in *Turner Broadcasting System, Inc., et. al., v. Federal Communications Commission*, 819 F.Supp 32 (D.D.C. 1993)	C-1
Concurring Opinion of The Honorable Stanley Sporkin, United States District Judge, filed April 8, 1993	D-1
47 U.S.C. Sections 534 and 535	F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM, INC., ARTS & ENTERTAINMENT NETWORK, BLACK ENTERTAINMENT TELEVISION, INC., E! ENTERTAINMENT TELEVISION, INC., HEARST/ABC-VIACOM ENTERTAINMENT SERVICES, INTERNATIONAL FAMILY ENTERTAINMENT, INC., NATIONAL CABLE SATELLITE CORPORATION, QVC NETWORK, INC., THE TRAVEL CHANNEL, INC. and USA NETWORKS,	RECEIVED MAY 3, 1993 CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA
Plaintiffs,	C.A. No. 92-2247 (SFW, TPJ & SS)
—and—	
NATIONAL INTERFAITH CABLE COALITION, INC. Operating as the VISION INTERFAITH SATELLITE NETWORK,	
Intervenor Plaintiff,	
v.	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	
Defendants.	

NOTICE OF APPEAL

Notice is hereby given this 30th day of April, 1993, that intervenor plaintiff, NATIONAL INTERFAITH CABLE COALITION, INC., hereby appeals to the United States Supreme Court pursuant to

28 U.S.C. §1253 from the final judgment of this Court entered on the 8th day of April, 1993 in favor of defendants FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA against said intervenor plaintiff.

/s/ Steven J. Hyman
STEVEN J. HYMAN (Admitted Pro Hac Vice)
LEAVY ROSENBERG & HYMAN
11 East 44th Street
New York, NY 10017
(212) 983-0400
Attorneys for Intervenor Plaintiff
NATIONAL INTERFAITH CABLE COALITION, INC.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM, INC., *et al.*	RECEIVED MAY 3, 1993 CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA
Plaintiffs,	
and	
ATLANTA INTERFAITH BROADCASTERS, INC.	
Intervenor Plaintiff,	
v.	C. A. No. 92-2247 (Three Judge Court) (SFW, TPJ, SS)
FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA	
Defendants.	

NOTICE OF APPEAL

Notice is hereby given this 3rd day of May 1993, that Plaintiff Atlanta Interfaith Broadcasters, Inc., hereby appeals to the United States Supreme Court pursuant to 28 U.S.C. § 1253 from the April 8, 1993 Order and final judgement of the three-judge District Court, entered on the 12th day of April 1993, in favor of Defendants Federal Communications Commission and the United States of America against said Plaintiff, dismissing the complaint with prejudice.

/s/ James H. Johnston
JAMES H. JOHNSTON (D.C. # 930172)
Suite 1000
1133 Connecticut Avenue NW
Washington DC 20036
(202) 659-1911

Attorney for:
ATLANTA INTERFAITH BROADCASTERS, INC.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM, INC., *et al.*, Plaintiffs, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, Defendants.	FILED APR 8 1993 CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA Civil Action No. 92-2247
DANIELS CABLEVISION, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 92-2292
TIME WARNER ENTERTAINMENT COMPANY, L.P., Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, Defendants.	Civil Action No. 92-2494

NATIONAL CABLE TELEVISION ASSOCIATION, INC., Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 92-2495
DISCOVERY COMMUNICATIONS, INC., *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 92-2558

MEMORANDUM AND ORDER

Before WILLIAMS, Circuit Judge, JACKSON and SPORKIN, District Judges.

THOMAS PENFIELD JACKSON, District Judge.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 534 & 535) ("the 1992 Cable Act" or "the Act") require cable television system operators to

carry the video signals of certain commercial and non-commercial educational television broadcast stations requesting that their signals be carried. The plaintiffs in these five consolidated lawsuits contend that these mandatory carriage (or "must-carry") provisions violate their First Amendment rights. Upon consideration of the entire record,[1] the Court holds that sections 4 and 5 of the 1992 Cable Act do not violate the plaintiffs' First Amendment rights.

Background

On October 5, 1992, Congress overrode a Presidential veto to enact the 1992 Cable Act. The Act subjects the cable industry to extensive regulation. Among other things, it subjects certain cable system operators to rate regulation by the FCC and by municipal franchising authorities; it imposes restrictions on distributors of cable programming that are affiliated with cable operators; and it directs the FCC to promulgate regulations imposing minimum technical standards for operators of cable systems.

Sections 4, 5, and 6 of the Act limit the freedom of cable operators to refuse to carry the signals of local broadcast stations, and, as a corollary, prevent cable operators from carrying broadcast signals without a broadcaster's consent.[2] The plaintiffs'

---

[1] During the pendency of this litigation, no fewer than 16 parties have sought to intervene as plaintiffs or defendants. These applications have been held in abeyance, but all of these applicants, together with several *amicus curiae* applicants, have been granted leave to participate herein as *amici*. All applicants for intervention have been permitted to file motions and memoranda as exhibits to their motions for intervention, and the Court has considered the entire record amassed in this case. The Court has, contemporaneously with the filing of this opinion, issued an order granting all pending motions for intervention insofar as the applicants seek to challenge or defend the must-carry provisions.

[2] "Broadcast" stations reach their viewers by transmitting electromagnetic waves through the air for interception by television receivers, usually equipped with antennas. Other entities in the business of producing video images, generically

(Footnote continued)

constitutional challenge to these three sections is the matter presently to be addressed by this opinion.

Section 4 of the Act requires all cable system operators with more than 12 channels to carry, upon request, the signals of licensed "local" commercial broadcast television stations whose signal is received over-the-air in the same television market as the cable system.[3] The operator need not devote more than one-third of its active useable channels to deliver local broadcast signals, but if there are not enough local broadcast stations to fill the one-third set-aside, the operator must carry the signal of one or two "qualified" low power broadcast stations.[4] Cable systems with 12 or fewer channels must deliver the signals of at least three local commercial broadcast stations unless the cable system has 300 or fewer subscribers, in which case it is not subject to the requirements of section 4 at all. An operator must carry the entire programming schedule of each commercial

---

referred to herein as "programmers," do not have access to the electromagnetic spectrum, and must find alternative means by which to reach viewers. Most often, programmers will arrange to have their signals transmitted by satellite to receptor dishes across the world. Cable "operators" develop a package of programming services by creating their own programming, by capturing the satellite signals of different programmers, and by capturing the broadcast signals of local and distant broadcasters on master antennas. These programming packages are generally sent by cable operators to their subscribers by coaxial cables strung along public rights-of-way.

[3] An operator's television market is defined by regulation, *see* 47 C.F.R. § 73.3555(d)(3)(i) (1992), but the FCC is empowered to make special market determinations upon request, *see* 1992 Cable Act § 4 (definitions) (to be codified at 47 U.S.C § 533(h)(1)(C)).

[4] Low power television stations are small broadcast operations with a limited geographic transmission range. These stations are licensed on a secondary basis; they cannot interfere with the signals of any full power station and must give way to any full power station attempting to occupy the same frequency. *See generally* 47 C.F.R. §§ 74.701-74.781 (1992); In the Matter of An Inquiry into the Future Role of Low Power Television Broadcasting and television Translators in the National Telecommunications System, BC Docket No. 78-253, 51 Rad. Reg. 476 (P & F) (April 26, 1982) [hereinafter *1982 LPTV Inquiry*].

station it is required to carry, and it may not accept or request payment for doing so. Every commercial broadcast station having a right to mandatory carriage must be carried by the cable operator, at the station's election, on its current over-the-air channel position, at the channel position it occupied on July 19, 1985, or at the channel position it occupied on January 1, 1992.

Section 5 of the Act requires operators of cable systems able to deliver signals on more than 36 channels to carry the signals of every local non-commercial educational broadcast television station requesting carriage,[5] unless the educational station's programming substantially duplicates that of another station carried by the system. Systems with 12 or fewer channels must carry one qualified non-commercial station, and systems having 12 to 36 channels must carry between one and three such stations. Section 5, like section 4, directs cable system operators to carry the entire programming schedule of the broadcast stations they are required to carry, and similarly prohibits operators from accepting payment in exchange for carriage. Each non-commercial station having a mandatory carriage right must be carried, at its election, on its current over-the-air channel position or on its channel position as of July 19, 1985.

Section 6 of the Act, which becomes effective on October 5, 1993, prohibits cable operators from retransmitting the signals of any commercial broadcasting station without obtaining the station's consent. In conjunction with section 4, section 6 provides local broadcasters with an option to request mandatory (but uncompensated) carriage on a system or to negotiate a carriage agreement with the operator. (Presumably, cable operators will want to carry the signals of larger, viewer-popular

---

[5] A qualified noncommercial educational station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station owned and operated by a municipality which transmits predominantly noncommercial programs for educational purposes. 1992 Cable Act § 5 (definitions) (to be codified at 47 U.S.C. § 535(l)(1)).

broadcasters and will pay for the privilege;[6] less popular broadcasters will be able to force their carriage by making a carriage demand under section 4.).

On the same day that the 1992 Cable Act became law, Turner Broadcasting System, Inc., the owner of several cable programming operations, brought this case against the FCC and the United States, challenging sections 4, 5, and 6 as unconstitutional under the First Amendment, asking for declaratory and injunctive relief.[7] Within the ensuing five weeks, four other plaintiff groups – comprised of cable system operators and programmers – brought similar suits seeking similar relief.[8] In addition to challenging sections 4, 5 and 6 of the Act, two of these plaintiff groups brought First Amendment challenges to multiple other provisions of the 1992 Act and to certain provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2782 ("the 1984 Act").[9] This three-judge U.S. District Court ("the Court" or "this Court") was convened pursuant to § 23 of the 1992 Cable Act, which commands that a three-judge court hear "any civil action challenging the constitutionality of section [4] or [5]" of the 1992 Act.

On November 23, 1992, this Court consolidated these five cases for the "purpose of determining issues related to the constitutionality of sections 4 and 5 of the [Act], and any matters determined to be ancillary thereto." *Turner Broadcasting Sys., Inc. v. FCC*, CA No. 92-2247, order at 2 (D.D.C. Nov. 23, 1992)

---

[6] Prior to the 1992 Act, cable operators were free to carry the signals of local broadcasters subject only to the "compulsory license" provisions of the copyright law. *See* 17 U.S.C. § 111 (1988). Under these provisions, operators may transmit broadcast signals if they pay royalty fees determined pursuant to an administrative schedule.

[7] *Turner Broadcasting Sys., Inc. v. FCC*, CA No. 92-2247. Turner later amended its complaint to add several additional cable programmers as plaintiffs.

[8] *Daniels Cablevision, Inc. v. United States*, CA No. 92-2292; *Time Warner Entertainment Co. v. FCC*, CA No. 92-2494; *National Cable Television Assoc. v. United States*, CA No. 92-2495; *Discovery Communications, Inc. v. United States*, CA No. 92-2558.

[9] *Time Warner*, CA No. 92-2494; *Discovery*, CA No. 92-2558.

(three-judge court). Four of the five plaintiff groups filed comprehensive preliminary injunction motions, but a hearing on those motions as to the must-carry provisions was postponed indefinitely upon the Court's approval of the parties' assent to a "standstill order" proposed by the parties. *See id.*, standstill order (D.D.C. Dec. 9, 1992) (three-judge court). On December 15, 1992, this Court declined to exercise jurisdiction over any claim other than the must-carry claims, *see Turner Broadcasting Sys. Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (three-judge court).[10]

The matter, i.e., the constitutionality of sections 4 and 5, is now before the Court on the motions for summary judgment of all five plaintiff groups; on the cross-motions for summary judgment of several intervenor-defendants; on the federal defendants' cross-motion to dismiss; on an intervenor-plaintiff's motion for preliminary injunction of sections 4 and 5 on "religion clause" grounds; and on an intervenor-defendant's motion for summary judgment on a cross-claim.

The plaintiff cable system operators and programmers contend that the must-carry provisions are, on their face, violative of their First Amendment rights to freedom of speech. The primary evil of those provisions, they assert, is that they force cable system operators to devote a portion of their finite signal-carrying capacity to deliver the signals of a privileged class of competing "speakers," i.e., over-the-air broadcasters, thus

---

[10] All motions for preliminary injunction with respect to sections other than 4 and 5 were denied by the single-judge district court. *See Time Warner Entertainment Co. v. FCC*, 810 F. Supp. 1302 (D.D.C. 1992) (Jackson, J.). A decision in these cases on the merits is forthcoming.

All of the plaintiffs challenge section 6, the retransmission consent provision, on the ground that it is not severable from section 4, and must be struck if section 4 is declared unconstitutional. Because the Court holds that section 4 is constitutional, plaintiffs' challenge to section 6 must fail, and the Court expresses no opinion on the severability issue. One of the plaintiffs, Daniels Cablevision, has brought an independent constitutional challenge to section 6. Pursuant to the Court's jurisdictional ruling, this challenge is before the single-judge court.

diminishing the number of channels remaining available to them for other programming they might prefer to carry. Must-carry also violates the First Amendment rights of the operators, they say, because it inhibits the operators' "editorial discretion" to determine what programming messages to provide to their subscribers,[11] compelling them perforce to deliver some programming they might otherwise choose not to carry. And the programmers argue that must-carry exalts broadcasters to preferred status as "speakers" by awarding them favored cable channel positions the programmers covet.

The concept of governmentally ordained mandatory carriage of broadcast signals is not a novel threat to the cable industry. The FCC first began to experiment with must-carry rules in the early 1960s.[12] The perceived need for must-carry today is based on the same premise that gave rise to it then: that local broadcast stations, unable to secure carriage on cable systems serving the same viewer markets, will, over time, lose their audiences and perish. *Compare* 1992 Cable Act § 2(a)(15) *and* S. Rep. No. 92, 102d Cong., 1st Sess. 42-46 *and* H.R. Rep. No. 628, 102d Cong., 2d Sess. 50-57 *with Rules Re Microwave-Served CATV, Dockets Nos. 14895 and 15233*, 38 F.C.C. 683 ¶ 51, 57, 58-82 (1965). As the audiences of broadcasting stations decline, so the reasoning goes, their advertising revenues will decrease correspondingly. Local over-the-air broadcasting operations, once they become unprofitable, will expire. Cable carriage of local broadcasting was then and is still now thought by its proponents to be essential not merely to ensure the continuing availability of programming with a "local" flavor to cable system subscribers, but also to preserve the vitality of a free source of over-the-air programming to television viewers unwilling or unable to obtain a cable connection.

---

[11] The plaintiffs note that the 1992 Act not only requires operators to carry local broadcast stations, it requires operators to carry these stations on a "basic service tier" that must be made available to all subscribers. 1992 Cable Act § 3(a) (to be codified at 47 U.S.C. § 543(b)(7)(A)).

[12] The early development of must-carry regulation is comprehensively traced in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Not surprisingly, the parties have expended considerable effort and resources arguing over the level of First Amendment scrutiny to be applied to speech regulation in the cable context. The plaintiffs contend that the must-carry provisions must be subjected to exacting First Amendment scrutiny; if they are not *per se* unconstitutional, they are assuredly permissible only if found to have been precisely drawn to serve a compelling government interest, and to go no further. *See. e.g., Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The defendants respond that if the First Amendment is implicated at all in this case, the must-carry provisions need only be judged by the interest-balancing traditionally applied to content-neutral speech regulation or legislation ostensibly unrelated to expression that is discovered to impose incidental burdens on speech. The nature of this inquiry, originating in *United States v. O'Brien*, 391 U.S. 367 (1968), and refined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), is to uphold such regulation when shown to promote a significant government interest and not to burden substantially more speech than necessary to vindicate that interest. *Rock Against Racism*, 491 U.S. at 799.

II.

In 1989, Congress began the first in a series of several hearings to assess the video programming distribution landscape in light of the 1984 Cable Act.[13] After an exhaustive fact-finding process including hearings held over three years,[14] the 1992

---

[13] *See Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing of June 1989*].

[14] *See, e.g., Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. (1991); *S. 12: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong.,

(Footnote continued)

Act was passed.[15] Congress' principal finding was that, for a variety of reasons, concentration of economic power in the cable industry was preventing non-cable programmers from effectively competing for the attention of a television audience. *See* 1992 Cable Act §§ 2(a)(2), (4), & (15). *See generally* 1992 Cable Act § 2(a); 1991 S. Rep. No. 92; 1992 H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); H.R. Rep. No. 862 (conference report).

Congress specifically found that cable had become the "dominant nationwide video medium." 1992 Cable Act § 2(a)(3); *see* 1991 S. Rep. No. 92 at 3. Almost 56,000,000 households – 60 percent of the households with televisions – receive cable television, 1992 Cable Act § 2(a)(3), and cable service is available to almost 90% of the nation, 1991 S. Rep. No. 92 at 3. In those homes receiving video signals by cable, cable has all but supplanted over-the-air broadcast television reception. 1992 Cable Act § 2(a)(17).

Congress also found that despite the dominance of cable, there is insufficient competition within the cable industry. First, there is little competition between cable operators. For many reasons "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," most regions of the country are served by one cable operator only. 1992 Cable Act

---

1st Sess. (1991); *"Must-Carry:" Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing of October 25, 1989*]. *See generally* 1991 S. Rep. No. 92 at 3-5 (1991) (discussing the 11 Senate hearings, held over two years, related to cable television); Debates, 138 Cong. Rec. S400, S635 (statement of Sen. Inouye) (daily ed. Jan. 30, 1992) ("[T]he bill before us is the result of 13 days of hearings and 113 different witnesses. We have had countless numbers of communications experts and lawyers look over the measure. We have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens.")

[15] *See generally* 1991 S. Rep. No. 92; 1992 H.R. Rep. No. 628 (1992); 1992 H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) (conference report).

§ 2(a)(2).[16] Second, the industry has become horizontally concentrated — many operators share common ownership. *See* 1992 Cable Act 2(a)(4).[17] Third, the industry is becoming vertically integrated. 1992 Cable Act § 2(a)(5). Many large entities that operate cable franchises also own and operate programming enterprises. *Id.; see also FCC Report, supra* note 16, at ¶¶ 77-80.

Congress determined that geographic monopolization, horizontal concentration and vertical integration have created barriers to entry for non-cable programmers, primarily broadcasters, attempting to obtain carriage on cable. Vertical integration contributes to this cable "bottleneck" by providing cable operators with economic incentive to grant affiliated programmers access to their systems while denying it to others. 1992 Cable Act § 2(a)(5). Similarly, horizontal concentration and the absence of effective competition among operators have obstructed broadcaster access by creating a climate conducive to another anti-competitive operator practice. Cable operators compete with broadcasters for advertising revenue. *Id.* at § 2(a)(14). Consequently, operators have an economic incentive to refuse carriage of broadcasters' signals to reduce broadcast viewership, thus attracting advertising dollars that otherwise would go to broadcasters. *Id.* at § 2(a)(15).

In summary, Congress concluded that the economic forces at work and the market conditions they had already produced had placed free local broadcast television in serious jeopardy. *Id.* at § 2(a)(16). It determined that mandatory carriage was

---

[16] Evidence received by Congress indicated that less than 1% of the cable operators in the nation face competition from other operators. *Federal Communications Commission Report*, MM Docket No. 89-600 ¶ 98 hereinafter *FCC Report*]; *Hearing of October 25, 1989, supra* note 14, at 40. *See generally* Debates, 138 Cong. Rec. S400, S436 (comments of Sen. Gorton) (daily ed. Jan. 30, 1992) (stating that although there are 11,000 cable operators in the nation, there are only 53 communities which are served by more than one).

[17] *See also Hearings of June 1989, supra* note 13, at 78 (testimony of Prof. Bagdikian) (testifying that the operators serving one-third of the cable subscribers in the nation are owned by two cable companies).

necessary to remedy unfair trade practices, to preserve local broadcasting for those who do not receive cable television, *id.* § 2(a)(12), as well as those who do, *id.* at § 2(a)(7), and to ensure that the public will continue to have access to a wide diversity of sources of video programming, *id.* at § 2(a)(6)-(11).

This Court is of the opinion that, in enacting the 1992 Cable Act, Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in "speech." The commodity Congress undertook to regulate is the means of delivery of video signals to individual receivers. It is not the information the video signals may be used to impart. That the video signals can only be used to convey a message is of no particular significance. The same is true of printing presses, or broadcast transmitters; loudspeakers, or movie projectors. Yet no one doubts that Congress could regulate a market in those commodities in danger of chaos or capture without being accused of attempting to infringe the First Amendment freedoms of those by whom they will be used to express protected "speech." The Cable Act of 1992 is simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information.

In other words, the Court holds that the must-carry provisions are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices. The regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers. So perceived, the Court concludes that the must-carry provisions are, in intent as well as form unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver.

III.

That the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable industry component, however, is a proposition now too well-established to reconsider.[18] But although many courts have considered the application of the First Amendment to various laws regulating cable,[19] the question of the First Amendment standard to be applied to compulsory signal-carriage requirements has yet to be definitively answered. Despite twice confronting the issue, the D.C. Circuit has avoided its resolution. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032

---

[18] *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (holding that operators' exercise of editorial control "plainly implicate[s] First Amendment interests."); *Quincy*, 768 F.2d at 1452-53; *see also Leathers v. Medlock*, 111 S. Ct. 1438, 1442-43 ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment . . . ."). Although the defendants vigorously contend that the plaintiff programmers have raised no First Amendment issues because their only claim is that broadcasters have been favorably treated, this argument misses the point because it mischaracterizes the programmers' claims. The programmers do not merely contend that Congress has failed to provide a benefit to programmers that it has provided to others. Instead, the programmers contend that Congress has, by increasing broadcaster speech in a limited forum, *reduced* the speech of the programmers. This is a First Amendment claim. *Quincy*, 768 F.2d at 1451-52.

[19] *See, e.g., Preferred Communications, Inc.*, 476 U.S. 488; *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989) *cert. denied*, 493 U.S. 1044 (1990); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable*, 768 F.2d 1434; *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Telestat Cablevision, Inc. v. Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Century Federal Inc. v. Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc. v. Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

(1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[20]

It appears to this Court that the must-carry provisions of the 1992 Cable Act squarely present this fundamental issue, and these cases demand that it be resolved. The Court today holds that the government need not demonstrate that it has used the least restrictive means to accomplish what is, primarily and essentially, economic regulation of an industry in the business of delivering video signals. The Court concludes that sections 4 and 5 of the 1992 Act will pass constitutional muster if they satisfy the criteria established in *O'Brien* and its progeny.

To be sure, in *Quincy* and *Century*, the D.C. Circuit held FCC rules requiring cable operators to carry the signals of local broadcasters to be unconstitutional. Neither case, however, is controlling here; the court of appeals was careful, in both opinions, to note that must-carry rules are not *per se* unconstitutional. *Century*, 835 F.2d at 304; *Quincy*, 768 F.2d at 1463. The court of appeals simply held, in both cases, that the FCC had failed to make a record demonstrating the existence of a governmental interest of sufficient moment — whether "compelling" or merely "significant" — to warrant such First Amendment burdens as were imposed by its regulations, or to demonstrate that the means it had chosen to employ to its putative end were necessary at all.

The record in support of the 1992 Cable Act, in contrast, was made by Congress. Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts.

---

[20] As discussed below, in both cases, the court held FCC must-carry regulations unconstitutional without finding it necessary to define the precise level of First Amendment scrutiny to be applied to them. *See also Preferred Communications, Inc.*, 476 U.S. 488 (holding that municipal restrictions on cable operator franchise access implicate First Amendment interests, but expressing no opinion on the level of scrutiny to be applied).

IV.

All parties agree (at least, the plaintiffs concede) that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either. The provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit. Nevertheless, a law need not be viewpoint-based to be subject to strict First Amendment scrutiny. It may, for example, be considered content-based and subjected to strict scrutiny if it purports to restrict a particular type or character of speech, irrespective of the position taken on any issue. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (public policy leaflets accompanying utility bills); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (placards embarrassing to or disparaging of a foreign government) (plurality opinion).

The plaintiffs contend that strict scrutiny applies because the must-carry provisions compel an operator to utter "speech" not of its choosing; because they alter an operator's editorial decision-making about what to say; and because they favor the speech of broadcasters over that of operators and programmers. But none of the epithets invoked by the plaintiffs — "compelled speech," or "editorial discretion," or "speaker-partiality" — are talismans automatically necessitating strict scrutiny. Strict scrutiny applies only if governmental regulation is overtly content-based or presents an opportunity for official censorship. A compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized only if it appears that the government has prescribed the content — either the message or the subject matter — of the speech to be spoken.[21] Examined

---

[21] Compelled speech presents two distinct content-related dangers. First, it may cause a speaker to say things he or she might otherwise choose not to

(Footnote continued)

carefully, all of the compelled speech and editorial discretion cases cited by the plaintiffs can be seen to have involved regulation telling the speaker *what* to say or at least what to talk about. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (state law requiring charitable fundraisers to disclose percentage of receipts actually devoted to good works); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 n.7 (1986) (plurality opinion) (state regulation requiring utility to mail fundraising appeals of its rate-making opponents); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state law requiring motorist to display bellicose state motto on license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 214 (1974) (state law requiring newspaper to carry replies of political candidates it had opposed editorially).

These cases stand in sharp contrast to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), in which the Supreme Court upheld a California constitutional provision interpreted to protect speech and petitioning at a privately owned shopping center. Significantly, the speaker's right to speak on the objecting owner's property upheld in *PruneYard* had nothing to do with the content or subject matter of his speech, and there was no danger that, in affording the speaker access to his shopping center, the owner would be affected to any degree in his ability to speak his own piece.

"Speaker-partial" regulations, or those that purportedly favor one group of speakers at the expense of others, similarly are not subject to strict scrutiny unless they are content-based. *Walsh v. Brady*, 927 F.2d 1229, 1236 (D.C. Cir. 1991); *see id.* at 1238-39 (Williams, J., concurring). *Buckley v. Valeo*, 424 U.S. 1 (1976), the principal speaker-partiality case cited by the plaintiffs, is not to the contrary. In *Buckley*, the Supreme Court struck down a statutory provision imposing a $1,000 limit on the amount which an individual could spend to support a particular political

---

say. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Second, it may deter a speaker from engaging in speech that is inconsistent with the compelled speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-7 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 & n.7 (1986) (plurality opinion).

candidate. The government sought to justify the provision on the ground that it was necessary to provide those of modest means with an opportunity to participate in the political process equal to that of the wealthy. *Id.* at 48. Implicit in this reasoning, of course, was a Congressional judgment that the speech of those spending over $1,000 was not only "louder" than those spending less than $1,000, but was also different and, more importantly, more sinister. *See id.* at 16-17. *Buckley* is thus a case in which the government sought, in effect, to suppress the expression of a meretricious idea. Speaker partiality alone, however, absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny.[22]

A regulation is deemed to be content-neutral if it is addressed to ends unrelated to the content of expression upon which it may have an effect. *Ward v. Rock Against Racism*, 491 U.S. at 791; *Texas v. Johnson*, 491 U.S. 397, 407 (1989). As the Court has previously noted, because the record indicates that Congress'

---

[22] The plaintiffs contend that any regulation that singles out a particular segment of the press, like cable operators, and imposes burdens on them alone, is presumptively unconstitutional. Although the Supreme Court has applied such a presumption to certain taxes that single out members of the press, *see Minneapolis Star*, 460 U.S. 575 (1983). *See generally Leathers*, 111 S. Ct. at 1443-44, this presumption does not apply to the must-carry provisions. The Court is unpersuaded that mandatory carriage of local broadcasters, as opposed to the specifically targeted differential taxes struck in *Minneapolis Star*, will so cripple cable operators as to leave them unable to exercise their own constitutionally conferred right to inform and entertain the public as they wish. *See Grosjean v. American Press Co.*, 297 U.S. 233, 246-47, 250 (1936) (discussing the historical use of differential *taxation* as a means of governmental censorship of the press). Furthermore, specifically targeted differential taxes raise an inference that government has regulated content because it is difficult to imagine governmental purposes unrelated to content that cannot be served by generally applicable means other than differential taxation. *Minneapolis Star*, 460 U.S. at 585. This inference does not arise with cable carriage requirements, however, because there are plausible legitimate goals that can be served by compelling broadcast carriage that cannot be served by any generally applicable means. The Court thus concludes that the must-carry provisions will not be strictly scrutinized merely because they treat operators and programmers differently from other components of the media.

primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals, the must-carry provisions appear to be unrelated to the content of the expression they will affect.

V.

The plaintiffs argue that the government's asserted interest in "promoting widespread dissemination of information from diverse sources," Federal Defendant's Memorandum at 33, betrays a content-based purpose. That Congress has found it necessary to preserve local broadcast television to promote "diversity," even for those who receive cable television, they contend, indicates that Congress perceives some content difference between the messages of "local" broadcasters and cable programmers.[23]

But if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*. Congress may have presumed, on a very non-specific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers. It appears to the Court, however, that Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete "local" subject-matter. So viewed, the must-carry provisions hardly evince the

---

[23] *See* 1992 Cable Act § 2(a)(6) ("[t]here is a substantial governmental and First Amendment interest in promoting a *diversity of views* provided through multiple technology media.") (emphasis added); *Amicus* Brief of the United States Senate at 27 ("[a]lthough cable systems may provide programming on a wide range of subjects, the *diversity of approaches* to those subjects may be reduced [if] control over the selection and development of programming is in the hands of fewer entities.") (emphasis added) *cf. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 570-71 (1990) (equating diversity in ownership of broadcast licenses to diversity of messages available to the public; "it is upon *ownership* that public policy places primary reliance with respect to diversification of content . . . .") (citations omitted, emphasis in original).

type of nefarious governmental activity guarded against by the First Amendment generally and the strict scrutiny standard in particular.

Moreover, even if a "local" versus "non-local" dichotomy of message exists, and can be said to be content-related in some abstract way, the cable medium exhibits certain characteristics unique to the way the industry has evolved and is presently structured, and of equally "local" dimensions having nothing whatsoever to do with message. Cable operators have prevailed upon "local" public authorities to license their use of public rights-of-way over which to string their coaxial cable networks, and there are manifestly limits to the number of such licenses likely to be issued. They vie with broadcasters for "local" advertisers. Cable operators have also historically enjoyed the right to retransmit "local" broadcast programming when and to the extent they wished subject only to administratively set royalty fees. The technology they employ enables a single cable operator to transmit a video signal superior to that of conventional over-the-air transmitters, and to deliver at a "local" television receiver a vastly greater number of channels to watch than all local broadcasters combined. There is, moreover, little competition among "local" cable operators themselves. In short, the term "local" as applied to the cable industry has many implications other than as a synonym for "provincial" as an adjective applied to programming and all were within the contemplation of Congress when it enacted must-carry.

The Supreme Court has observed that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[24] *Southeastern Promotions,*

---

[24] Although this maxim is oft-repeated, the Supreme Court has infrequently invoked unique media characteristics to justify relaxed scrutiny of content-based regulations. The single notable exception is in the broadcast context, in which the Supreme Court has found content-based, fair access regulation to be justified by scarcity of electromagnetic spectrum space, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and has found limited content-based indecency regulations to be justified by broadcasting's pervasive presence

(Footnote continued)

Ltd. v. Conrad, 420 U.S. 546, 557 (1975); *see Quincy*, 768 F.2d at 1448. *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) *with Tornillo*, 418 U.S. 241. Cable has achieved its present market dominance, in large part, due to such "local" factors — artifacts of a sort of the industry's evolution — not because it has delivered an intrinsically better message. Similar factors, benign in themselves, perhaps, and characteristic of many successful industries having supplanted older rivals, have nevertheless lead to regulation of such industries *for economic reasons* when their market powers have reached dangerous proportions.

Absent an indication of a Congressional purpose, whether avowed or covert, to effect a degree of content-control by mandating carriage of "local" broadcasters' signals, the First Amendment should not unduly inhibit Congress in what clearly appears on its face to be an effort to level the economic playing field in the television industry, at large, even if in doing so it may coincidentally inhibit some freedom of choice of the cable operators as to whose signals are to be carried and under what conditions. The Court accordingly concludes that *O'Brien* and *Rock Against Racism* provide the appropriate standard for determining the constitutionality of Congress' mandatory carriage provisions.[25]

---

and unique accessibility to children, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). *PruneYard*, arguably, is also a case in which the Court found that special contextual characteristics of the "California shopping center" justify special First Amendment treatment. *See PruneYard*, 447 U.S. at 87. As discussed above, however, *PruneYard* is just as easily explained as a content-neutral case. *See Pacific Gas*, 475 U.S. at 12. The Seventh Circuit apparently has ruled that all regulation of cable speech, whether or not content-based, is subject to relaxed First Amendment scrutiny because of special characteristics peculiar to the cable medium. *Chicago Cable*, 879 F.2d at 1547-49; *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

[25] The plaintiffs correctly note that the Supreme Court, in *Tornillo*, rejected the suggestion that economic impediments to access justified Florida's right-of-reply law. *Tornillo*, 418 U.S. at 247-57. But, read in context, the Supreme

(Footnote continued)

VI.

The inquiry to be made under the *O'Brien-Rock Against Racism* formulation is to ascertain whether the must-carry provisions further a significant government interest, *O'Brien*, 391 U.S. at 377; *Rock Against Racism*, 491 U.S. at 798-99; *see also Quincy*, 768 F.2d at 1454 and whether they are "narrowly tailored" to serve that interest, *O'Brien*, 391 U.S. at 377; *Rock Against Racism*, 491 U.S. at 798. The narrow tailoring requirement is satisfied if the government's regulation will effectively remedy the condition that the government has identified as in need of correction, and if it does not burden substantially more speech than necessary in doing so. *Rock Against Racism*, 491 U.S. at 799.

Court's discussion in *Tornillo* has no application in this case. Importantly, the regulation in *Tornillo* was *expressly* based on content in two ways; it exacted its penalty on the basis of the antecedent publication of one message and it compelled carriage of another. *Tornillo*, 418 U.S. at 256-58. The government, in *Tornillo*, sought to use economic scarcity as a justification for ensuring that the public had access to messages favorably portraying political candidates who had been criticized in the press. It was in this context that the Court rejected the argument that economic barriers to newspaper access justify content-based compelled speech requirements. In this case, by comparison, the government has sought only to ensure that the public has access to diverse kinds of communications in order to overcome technological, structural, and historic, as well as economic factors creating a bottleneck. This goal is a far cry from the message-specific goal in *Tornillo*, even if marginally content-related.

The Court notes that its conclusion that contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related, depends, to some extent, on Congress' factual findings. The parties have raised the issue of whether the courts should strictly scrutinize a congressional decision that a particular communications medium warrants special First Amendment treatment. The Court finds that it need not resolve this intriguing question. With respect to the factual findings made by Congress, the Court has provided Congress with the level of deference befitting a co-equal branch of government that is well-equipped to take evidence and make findings. *Metro Broadcasting*, 457 U.S. at 569; *see also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). The Court, however, has viewed as a matter of law, subject to no deference to Congress, the issue of whether the facts present the need for special First Amendment treatment.

Congress' objective in enacting the mandatory carriage requirements, it has declared, was to promote fair competition among video "speakers" in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not. *See* 1991 S. Rep. No. 92 at 58; Federal Defendant's Memorandum at 33. Although the D.C. Circuit declined an invitation to rule on whether this is a governmental goal of sufficient significance for *O'Brien* purposes, *see Quincy*, 768 F.2d at 1454, other cases establish that the importance of broadcasting generally, and in particular local broadcasting, to the American public is now beyond dispute.[26] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn. 38 & 39 (1968); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984);[27] *cf. Metro Broadcasting*, 497 U.S. at 566-68, 572-73. *See generally* Communications Act of 1934, § 307(b), 48 Stat. 1083.

The plaintiffs submit that even if averting the demise of local broadcasting is deemed an important governmental goal, the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril, is incorrect. Citing their own statistics, the plaintiffs contend that broadcasting is alive and well, and has actually grown since the FCC's must-carry rules were struck down in *Quincy*. Oppressive artifices such as must-carry, they say, are unnecessary.

---

[26] 1992 H.R. Rep. No. 628 at 50 ("[l]ocal television stations are central to [a competitive system of over-the-air-broadcasting] — they are both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium.")

[27] The Supreme Court, in *Capital Cities*, considered an Oklahoma law prohibiting state cable companies from carrying out-of-state alcohol advertising. The Court held that the law was preempted by the FCC must-carry provisions in effect at the time. The Court rejected the state's argument that its power to regulate alcohol under the Twenty-First Amendment was paramount to the federal mandatory carriage program. The Court found that the state's interest in regulating alcohol was outweighed the "substantial federal interest" in protecting broadcast television for those that do not receive cable, and in ensuring diverse video programming. *Capital Cities*, 467 U.S. at 714.

Congress, however, did not agree, and in sharp contrast with the meager record before the FCC when the court of appeals struck down the must-carry provisions in *Quincy* and *Century*, the current must-carry provisions are based on a substantial record assembled by Congress itself. *See generally* 1991 S. Rep. No. 92 at 42-46 (citing Federal Communications Commission, Policy and Rules Division, Mass Media Bureau, Cable System Broadcast Signal Carriage Survey (1988) (staff report)); 1992 H.R. Rep. No. 628 at 50-57 (same). Congress received evidence demonstrating, to its satisfaction, that cable operators, in significant numbers, are denying carriage to local broadcasters, are attaching onerous conditions to their agreements to carry broadcasters, and are exiling broadcasters being carried to remote channel positions. 1991 S. Rep. No. 92 at 42-43; 1992 H.R. Rep. No. 628 at 51. Congress also apparently credited evidence indicating that this unfavorable treatment of broadcasters is the result of the cable operators' attempts to obtain a competitive advantage, not a function of consumer demand. 1992 Cable Act § 2(a)(12)-(15); 1991 S. Rep. No. 92 at 44.[28] Congress determined that refusal to carry, termination of carriage, and channel repositioning artificially diminish the audiences of local broadcasters, and, in turn, decrease their revenues. 1992 Cable Act § 2(a)(11)-(15); 1991 S. Rep. No. 92 at 44-45, 59; 1992 H.R. Rep. No. 628 at 50-51. In light of all of the evidence, Congress concluded that local broadcast television is not flourishing; it is in serious jeopardy. 1992 Cable Act § 2(a)(16); 1991 S. Rep. No. 92 at 59.

Furthermore, even if the state of the broadcasting industry is not now as parlous as the defendants contend, the Court finds

---

[28] The Senate Committee on Commerce, Science, and Transportation, for example, received evidence indicating that "[i]n almost every instance, [broadcast] stations [that have been repositioned] have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both." 1991 S. Rep. No. 92 at 44. The Committee concluded that channel repositioning of broadcasters is "made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities." *Id.*

it to be indisputable on this record that cable operators have attained a position of dominance in the video signal distribution market, and can henceforth exercise the attendant market power. The Court does not find improbable Congress' conclusion that this market power provides cable operators with both incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy. In light of the considerable body of evidence amassed by Congress, and the deference this Court should accord to the factfinding abilities of the nation's legislature, *see Metro Broadcasting*, 457 U.S. at 569; *Columbia Broadcasting Sys.*, 412 U.S. at 103, the Court must conclude that the danger perceived by Congress is real and substantial.

The plaintiffs also contend that the must-carry provisions are not "narrowly tailored" to accomplish their objective. There seems to be little doubt that the must-carry provisions will be effective in sustaining local broadcasting for the present. Rather than dispute their effectiveness as a means to the end, therefore, the plaintiffs' complaint is that they are overly so; being excessive, they burden speech in instances in which governmental intrusion is unnecessary.

First, they argue that Congress' goal can be achieved by the use of rudimentary technology, (a selector switch, for example), enabling broadcast and cable signals to be equally accessible to cable subscribers who want to watch them; viewer preference will then determine the victor in an idealized "marketplace of ideas." Second, they contend that mandatory cable carriage of *all* local broadcasters is too much of a good thing; it may require an operator to carry signals of broadcasters it would not otherwise carry in a market in which there is actually a surfeit of "local" programming on cable as well as over-the-air. The Court concludes, however, that the must-carry provisions are sufficiently, if not surgically, tailored to Congress' larger economic market-adjusting objective.

It is, of course, conceivable that there are less restrictive alternatives that Congress could have employed in its attempt to

preserve the vitality of local broadcasting. Importantly, however, under *O'Brien*, the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome. *Rock Against Racism*, 491 U.S. at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Congress actually found that input-selector switches were ineffective simply because viewers tended not to use them (a function, perhaps, of viewer inertia as much as viewer preference). *See* 1991 S. Rep. No. 92 at 44-45; 1992 H.R. Rep. No. 628 at 54; *see also* 1992 Cable Act § 2(a)(17). Of more significance, however, is that Congress further found that prophylactic measures were necessary to combat the operators' tendencies toward anticompetitive treatment of broadcasters generally. *See* 1991 S. Rep. No. 92 at 41-46; 1992 H.R. Rep. No. 628 at 50-58. Once again, the Court is unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective. Provoking a popularity contest between broadcast and cable programmers was not what it had in mind. *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-11 (1982).

Finally, the Court concludes that the must-carry provisions do not unnecessarily burden a substantial amount of the plaintiffs' own speech. Operators retain complete discretion over much the greater proportion of the channel spectrum on their systems, and non-broadcast programmers are free to compete for access to those channels not dedicated. Under no circumstances will an operator be required, under section 4, to devote more than one-third of its channel capacity to local broadcast use.[29] Similarly, under section 5, operators with less than 36 useable channels need not carry more than 3 non-educational channels, and no operator must carry duplicative non-educational programming. Thus, although the must-carry regulations may reduce the overall quantity of cable operator

[29] Furthermore, it appears to the Court that the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request.

and programmer speech "opportunities," as it were, it leaves open adequate – in fact, plentiful – alternative, intra-medium channels of communication for cable speakers to deliver whatever messages they choose. The Constitution requires no more. *Compare Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) *with Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990)

Conclusion

The 1992 Cable Act represents a major congressional effort to bring order and stability to an industry that significantly, and often profoundly, touches American lives. It is not the province of this Court to pass judgment upon the wisdom of the policies the national legislature has chosen to pursue in such endeavors. That, of course, is a task our system of government commits to the electoral and political processes, and the Court's power in that regard is not enlarged merely because it is invoked in the name of the First Amendment. Simply put, the governmental intention evinced by the must-carry provisions is economic, not ideologic, and raises no suspicion of the type of ominous government interference with speech against which the First Amendment protects.

VII.

National Interfaith Cable Coalition ("NICC") seeks to enjoin enforcement of sections 4 and 5 of the 1992 Cable Act on another First Amendment ground, namely, that the provisions violate the Free Exercise and Establishment of Religion Clauses of the First Amendment. NICC's motion is opposed by the federal defendants, who have filed a motion to dismiss, and by several intervenor-defendants, many of whom have filed dispositive motions. The Court concludes that sections 4 and 5 do not violate the Religion Clauses of the First Amendment.

NICC is an "interfaith consortium" of several Judeo-Christian religious groups in the United States. NICC disseminates its messages through the Vision Interfaith Satellite Network ("VISN"), a cable programming operation which competes for

carriage on the many cable systems across the country. Like the other programmers, NICC objects to the must-carry provisions because the provisions will reduce the number of cable television channel positions available for use by non-broadcast programmers. By mandating carriage of the religious programming of local broadcasters, the provisions represent a special danger to NICC: it fears that cable operators forced to carry some broadcast religious programming will resist voluntary carriage of additional religious fare.

NICC's Religion Clause challenges center on the premise that the religious programming of local broadcasters is different in kind from NICC's programming. NICC contends that most local religious broadcasters tend to present fundamentalist religious views and are often critical of other viewpoints, while NICC transmits messages that are more "mainstream" and "religiously balanced." NICC argues that the must-carry provisions, by granting preferential treatment to local religious broadcasters, create an illicit liaison between the federal government and particular sectarian interests in violation of the Establishment Clause, and by impeding NICC from reaching its audience and delivering its own religious message, the provisions violate the Free Exercise Clause.

To comport with the Constitution under the now familiar Establishment Clause test, government action must "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee v. Weisman*, 112 S. Ct. 2649, 2654 (1992) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)). Even if the Court were to accept NICC's major premise — that the must-carry provisions disproportionately favor the speech of certain types of religious speakers over others — the provisions do not violate the Establishment Clause. There is no evidence that the must-carry provisions were intended to be anything but religion — as well as content-neutral; they do not involve the government in religious affairs; and there is no basis for concluding that they will be perceived to represent governmental endorsement of particular religious views or religion in general.

The provisions clearly reflect a secular purpose, as discussed above. There is nothing in the record to indicate that Congress was even aware of any difference in the religious messages of broadcasters and programmers, much less to indicate that must-carry represents a deliberate attempt to favor or disfavor any religious views or practices.

Similarly, the must-carry provisions have a primary effect that neither advances nor inhibits religion. A law does not violate the Establishment Clause merely because it benefits or burdens religious institutions in some way. *Mueller v. Allen*, 463 U.S. 388, 393, 398-402 (1983); *see Waltz v. Tax Comm'n*, 397 U.S. 664 (1970). "Incidental" burdens and benefits on religious institutions do not violate the Establishment Clause's primary effect inquiry. *See Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981). Central to the primary effect inquiry is whether a reasonable observer would interpret the governmental action to be religion-preferential, *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *see Widmar*, 454 U.S. at 274, and there is little danger of such a perception if a law applies to a broad range of entities, both religious and secular. *Widmar*, 454 U.S. at 274-74.[20] *Compare Mueller*, 463 U.S. 388 (upholding state law providing income tax deduction for tuition, textbook and transportation expenses for parents of children in public as well as parochial schools) *with Nyquist*, 413 U.S. 756 (1983) (holding unconstitutional public assistance grants to parents of children in nonpublic schools only). The must-carry provisions apply to all broadcasters, without regard to whether their programming contains any religious fare at all. Accordingly, the Court cannot conclude that the primary effect of the provisions is to advance the religious message of local broadcasters or suppress the religious messages of cable programmers.

Nor can the Court conclude that the must-carry provisions foster excessive governmental entanglement with religion.

---

[20] As the Supreme Court noted in *Widmar*, "[i]f the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75 (citations omitted).

Regulatory legislation creates excessive entanglement only if there is "detailed monitoring and close administrative contact" between the government and sectarian organizations or affairs. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 696-97 (1989); *see Mueller*, 463 U.S. at 403. There is no basis on which to conclude that the federal government will, in implementing must-carry, become involved in any activity in the nature of religious oversight. To be eligible for mandatory carriage, a broadcaster must meet two basic requirements only; it must be licensed by the FCC and it must operate within a cable operator's television market. 1992 Cable Act § 4. The must-carry provisions accordingly present no danger of entanglement beyond that created by the FCC's broadcast license scheme itself. It is well-settled that "routine regulatory interaction which involves no inquiries into religious doctrine" creates no Establishment Clause infirmity. *Hernandez*, 490 U.S. at 697.

NICC contends that the must-carry provisions violate the Free Exercise Clause because they prevent NICC from effectively disseminating its religious message. Any burden imposed on NICC's religious practice, however, is merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters. Such laws do not violate the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872 (1990). The must-carry provisions do not, in any way, foreclose dissemination of any religious message or abridge any religious practice.

VIII.

The Local Community Broadcasters ("LCB"), an intervenor-defendant in these consolidated cases, argues that section 4 of the 1992 Act violates the First Amendment rights to free speech and equal protection rights of low power television ("LPTV") stations. By way or relief, LCB asks this Court to require the FCC to provide expansive mandatory carriage rights, similar to those provided to full power broadcasters, to LPTV. Even assuming this Court has the power to provide such a remedy, a dubious proposition, the Court finds that section 4 does not abridge LCB's constitutional rights.

In the late 1970s and early 1980s, the FCC began to implement a program for providing low power television service to viewers across the nation. LPTV operates on the same technological principles as broadcast television, but within a minimal geographic range. In addition, LPTV stations are licensed by the FCC on a secondary basis; they may not interfere with the signals of licensed full power stations, and they must give way to any full power station attempting to use the same frequency. *See generally* 47 C.F.R. §§ 74.701-74.781 (1992); *1982 LPTV Inquiry*, *supra* note 4. The Commission envisioned LPTV as a less costly alternative for those seeking to enter the television broadcast industry,[31] and saw LPTV as enhancing diversity in the television market, especially for minority broadcasters.[32]

The 1992 Cable Act provides very limited mandatory carriage rights to LPTV. Under section 4, a cable operator is only required to carry a low power station if there are not enough full power commercial broadcasters to fill the one-third channel set-aside imposed by the section. Furthermore, a low power station is eligible for mandatory carriage only if it serves a rural area without full power service. Cable operators with fewer than 36 channels are required to carry one qualified LPTV station, and those with 36 channels or more need only to carry two qualified LPTV stations.

LCB's constitutional claims are similar to those made by the programmers. LCB claims that because the must-carry provisions favor local full power broadcasters by providing them with scarce channel positions and fail to provide similar rights to many rural and all non-rural LPTV stations, the provisions impede the ability of LPTV stations to reach their audiences. LCB also claims that like the programmers, LPTV operators need must-carry to defend themselves against anti-competitive cable operator practices.

---

[31] *An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 82 F.C.C.2d 47, 80 (1980) (statement of Chairman Ferris).

[32] *See id.*

Although LCB's claims are similar to those of the programmers, the relief they seek is entirely different. LCB asks this Court to order the FCC to provide LPTV broadcasters with mandatory carriage rights similar to those enjoyed by full power stations. The success of LCB's claim accordingly rests on the untenable position that the must-carry provisions do not violate the constitutional rights of programmers, but do violate the constitutional rights of LCB's members. Furthermore, comparison of the relief sought by LCB and that sought by the programmers makes clear that LCB is not challenging the must-carry provisions on the grounds that they interfere with First Amendment rights; it is, instead, claiming that they have been disparately treated.[33]

Unless viewpoint-based, disparate governmental treatment of different speakers, unlike governmental imposition of burdens on expression, does not implicate either *O'Brien* balancing or strict scrutiny. Messageneutral government decisions to provide benefits to one group of speakers but not others are constitutional if there are rational legislative reasons for distinguishing between groups. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46; *accord id.* at 548-51 (governmental distinctions between groups of speakers subject only to rational basis review under equal protection component of Fifth Amendment unless they are aimed at the suppression

---

[33] Because LCB asks this Court to uphold a statute that is alleged to burden their expressive activity, their claim is distinguishable from those made in virtually all of the First Amendment cases LCB has cited. *Minneapolis Star* and *Arkansas Writers' Protect, Inc. v. Ragland*, 481 U.S. 221 (1987), for example, both involved challenges to differential taxation schemes applicable to small segments of the press. *See generally Leathers*, 111 S. Ct. 1442-43. The plaintiffs in both cases raised direct First Amendment claims because they challenged the *validity of the taxes* as either directly burdensome on speech or creating impermissible dangers of governmental censorship. In contrast, the position taken by LCB demonstrates that its sole *constitutional* concern is that the must-carry provisions fail to provide LPTV with the protection from anti-competitive practices that has been provided to full power broadcasters.

of ideas); *Walsh*, 927 F.2d at 1235-37 (same); *id.* at 1238-39 (Williams. J., concurring) (same).[34]

LPTV was conceived and created as a secondary service, and has never enjoyed rights coextensive with full power television. *See 1982 LPTV Inquiry, supra* note 4. Congress's treatment of LPRV is consistent with the government's treatment of LPTV since its inception. Once again, in the absence of any reason to suspect Congress of message-regulation, the Court must uphold Congress' decision not to equalize the free speech rights of LPTV with full power broadcasting unless it is irrational. *Regan*, 461 U.S. at 548. Nothing at all appears to be irrational about a legislative policy judgment to treat LPTV as a lesser player in the television market, as it has always been, no matter how innovative, imaginative, or deserving the Court might find LPTV to be.

For the foregoing reasons, it is, this 8th day of April, 1993,

ORDERED, that the plaintiffs' motions for summary judgment on the must-carry claims are denied; and it is,

FURTHER ORDERED, that the federal defendants' motion to dismiss the must-carry claims are granted; and it is,

FURTHER ORDERED, that the motion of intervenor-defendant Local Community Broadcasters for summary judgment on a cross-claim is denied; and it is

FURTHER ORDERED, that the complaints of the plaintiffs and the intervenor-plaintiffs, insofar as they challenge as unconstitutional sections 4 and 5 of the 1992 Cable Act, are dismissed with prejudice; and it is

---

[34] LCB's equal protection claim is based entirely on the somewhat esoteric fundamental rights line of equal protection jurisprudence. Although LCB indicates that LPTV operations are often run by minority groups, there is no allegation that LPTV operators are a suspect class.

FURTHER ORDERED, that the complaints of the plaintiffs, insofar as they challenge section 6 of the 1992 Cable Act as not severable from purportedly unconstitutional provisions of that Act, are dismissed with prejudice; and it is

FURTHER ORDERED, that the cross-claim of intervenor-defendant Local Community Broadcasters is dismissed with prejudice; and it is

FURTHER ORDERED, that all other pending motions relating to the constitutionality of sections 4 and 5 of the 1992 Cable Act are denied and dismissed as moot.

/s/Thomas Penfield Jackson

Thomas Penfield Jackson
U.S. District Judge

/s/Stanley Sporkin

Stanley Sporkin
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
APR 8 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM,	)	
	)	Civil Action No.
Plaintiff	)	92-2247 (Three
v.	)	Judge Court)
UNITED STATES OF AMERICA,	)	
	)	Civil Action
Defendant.	)	Nos. 92-2292,
	)	92-2494,
	)	92-2495,
AND CONSOLIDATED ACTIONS	)	92-2558
	)	

CONCURRING OPINION

STANLEY SPORKIN, District Judge.

I concur. I believe that Plaintiffs have not made a case under the First Amendment that would invalidate the must-carry provisions of the 1992 Cable Act. Congress has acted in a highly reasonable and responsible way without trampling the constitutional rights of this nation's citizens. I write separately to emphasize that, because any burden imposed by the 1992 Cable Act on speech is so remote and incidental to the purpose and effect of the 1992 Cable Act, I do not find that the must-carry provisions of the Cable Act of 1992 implicate the First Amendment to the extent to which Plaintiffs claim.

For many years, Congressional policy regarding the telecommunications industry has had a consistent goal: To foster public access to a diverse array of information and views. Congress has found that, to a significant degree because of federal and local governmental decisions in prior years, the cable industry threatens to achieve monopolistic control over the telecommunications market. Thus, a competitive imbalance between the cable and broadcast industries has developed, threatening this important goal.

Congress' finding is based on an exhaustive Congressional record, and deserves the Court's deference. Plaintiffs, under the guise of the First Amendment, would have this Court strike down a statute enacted by Congress in an effort to reign in cable companies' growing economic might and to restore competitive balance in the telecommunications industry. However, this case is not about protecting free speech and the First Amendment. This case is about market domination and control.

I

This case involves two young industries which are essentially less than a half century old. It might be said that invention of television was the first shot fired in the technology revolution, which continues even at this time at an unprecedented pace. From early on, because of the space limitations of the broadcast spectrum, a means had to be devised for allocating stations on a reasonable and fair basis. Congress determined that market forces alone could not make the proper allocation. Thus, right from the start this infant industry was born into a system of heavy regulation.[1]

The cable industry dates back to 1947, when it first emerged as a satellite system. Cable originated as a device to facilitate transmission of television broadcast signals to remote areas.[2]

---

[1] The FCC, created in 1934, became the principal vehicle for overseeing the television industry. That agency was given jurisdiction to allocate space on the broadcast band by awarding licenses to those desiring to become broadcasters. These were highly lucrative licenses, which in effect were being given away by the government. Here in this nation of free markets we had a paradox of sorts, namely a mix of government regulation and private enterprise, being dictated by the scarcity of a much sought-after commodity that would confer rights on those selected to receive a "free" Government license to broadcast.

[2] John Walson, Sr., is credited as being the founder of cable television. Mr. Walson recently passed away. In his obituary, the following is recounted:

> In 1947, Mr. Walson was the owner of an appliance store in Mahanoy City, near Allentown, when he discovered he had trouble selling televisions because the mountains of eastern Pennsylvania interfered with reception.

(Footnote continued)

Recognizing the potential of the technology to serve the interests of rural America, Congress began to explore ways to protect and foster the nascent industry.

For several decades, while studying the issue, Congress left regulation of the cable industry to the FCC. In part because of its origin as an adjunct to broadcasting, cable became cloaked in much of the regulatory culture enveloping the broadcast industry.

In the mid-1970s, Congress determined that a number of regulatory and marketplace obstacles had prevented the cable industry from achieving its full potential. To enhance cable's development as a competitive force in the telecommunications market, Congress enacted several laws to support the growth of the industry.

In 1976 Congress passed legislation granting cable systems' copyright licenses to retransmit over-the-air broadcast stations. Public Law No. 94-553, Title I, § 101 (1976), *codified at* 17 U.S.C. § 111. In 1978, in response to cable operators' claim that utility companies were exacting unreasonable rates for the operators' use of utility poles and underground conduits, Congress passed legislation authorizing the FCC to resolve pole attachment disputes between the operators and utility companies. Public Law No. 95-234, §6 (1978), *codified as amended at* 47 U.S.C. §224. Through the pole attachment legislation, Congress sought

---

He erected an antenna tower atop New Boston Mountain overlooking Mahanoy City and ran wire to television sets in his store window. He added amplifiers to the system the next spring, then persuaded residents to hook up for a $100 installation fee and $2 a month.

His company, called Service Electric Cable TV, now has more than 400 employees and serves subscribers in eastern and central Pennsylvania and northwestern New Jersey.

Mr. Walson made cable television history again in 1972, when his company became the first to offer the cable channel Home Box Office to customers. HBO recently presented him with an award recognizing that distinction.

"to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[3]

Meanwhile, since cable often required use of local telephone lines, state and municipal authorities developed local franchise and license systems further regulating cable in their respective markets. Thus, in some ways, regulation of the cable industry was even more pervasive than that of the broadcast industry in general, often to the detriment of both the industry and its subscribers.

Perceiving a need to establish a national policy for cable television, Congress passed the Cable Communications Policy Act of 1984. Consistent with Congress' long-standing policy regarding the telecommunications market as a whole, the 1984 Act aimed to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." Public Law No. 98-549, §2 (1984), *codified at* 47 U.S.C. § 521(6).

The 1984 Cable Act contained several provisions to support cable's competitive position. With regard to local franchising authorities, the Act (1) restricted their ability to regulate rates, allowing them to do so only where there was a lack of effective competition, to be defined by the FCC, (2) limited the obligations they could impose on cable companies and (3) limited their authority to deny renewal of cable franchises.

At the same time, Congress took steps to assure that cable would contribute to the diversity of information available to the public. To thwart the development of local media monopolies and to encourage diversity of ownership of communications outlets, the 1984 Act prohibited ownership of a cable company by the owner of a television broadcast license or telephone company. And to foster a broad diversity of information sources, the Act permitted cities to continue to require in cable franchises

---

[3] S. Rep. No. 580, 95th Cong., 1st Sess. 14 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 122.

that certain cable channel capacity be devoted to public, educational and governmental channels.

As a result of technological innovation and creativity and supported by federal legislation, the cable industry has come a long way in its less than 50 years' existence. Indeed, there is little resemblance between the cable industry of 1947 and that of today. Cable has expanded television communications beyond the wildest imagination of its discoverers. It has virtually eliminated the original problems caused by the space limitation of the broadcast spectrum. Instead of providing access to television broadcasting as its main objective, through creativity and vision, cable now has a free standing existence. It has developed from being the dog's tail to being the tail that wags the dog.

Although cable has brought about much good, there have been excesses which, over the years, Congress has felt compelled to alleviate. In particular, Congress has found that certain anti-competitive, monopolistic behavior on the part of cable companies has accompanied their success, behavior which threatens the vitality of broadcast programming and, therefore, the public interest in access to a wide range of information and views.[4] Thus, while cable has virtually eliminated the problems caused by scarcity on the broadcast spectrum, it has created another scarcity—namely access to the channels on cable systems themselves.

In finding that the must-carry provisions of the Cable Act do not violate the First Amendment, several points merit special emphasis. First, local and federal government regulation played an important role in allowing cable to achieve the position it has today. In addition to the support provided by federal legislation in the 1970s and by the Cable Act of 1984, all too often local franchising authorities granted cable companies an exclusive franchise in their local market.

---

[4] *See* Judge Jackson's Opinion, supra, for a discussion of the Congressional findings in this regard and the voluminous record supporting them.

Second, cable companies enjoying such de facto monopolies wield enormous power over programming in the telecommunications market as a whole. Cable operators can require programmers to provide the operator exclusive carriage rights or a financial interest in the programming as a condition of carriage, and some have done so. The substantial negative impact such conditions have on broadcast stations and television distributors is clear.

Third, as an increasing proportion of the public subscribed to cable (now 60% of American households owning a television set), broadcast stations have become increasingly dependant on cable to reach their television audiences. As cable has become the primary means for transmission of all broadcast signals in a locality, it has become imperative for broadcasters to obtain retransmission of their signals by the local cable company. Otherwise, the broadcaster will face a greatly diminished audience. Since it is often the case that cable and broadcast companies are in direct competition for advertising revenues, cable companies have a powerful means by which to adversely affect the financial interests of broadcast stations by refusing to carry or even terminating its broadcast clients.

Congress specifically found that broadcast stations, by being part of the local community, continue to be an important source of local news, public and educational programming and other services critical to an informed electorate. The cable industry's growing monopolistic hold on the telecommunications industry, Congress reasoned, threatens the viability of its only current competition—local broadcasters. Congress concluded that, should local broadcasters be forced off the air, the public interest in being able to obtain access to a broad selection of local news and public and educational programming would be endangered.

II

Sections 4 and 5 of the Cable Act of 1992 are a form of regulation, designed to lessen the monopolistic threat posed by cable to the telecommunications industry. Contrary to the arguments

of Plaintiffs that the 1992 Act limits First Amendment rights on its face, the Act's objective is to enhance the diversity of television voices protected by the First Amendment by neutralizing the adverse effects of cable companies' monopolistic behavior and securing the position of broadcasters' programs. As an interim measure to accomplish this end, "must-carry" is an integral part of the solution to the problems identified by Congress.[5]

Plaintiffs have come before this Court, not because their freedom of speech is seriously threatened, but because their profits are; to dress up their complaint in First Amendment garb demeans the principles for which the First Amendment stands and the protections it was designed to afford. To the extent to which the First Amendment is implicated, I agree with Judge Jackson that the minimal level of scrutiny outlined in *United States v. O'Brien*, 391 U.S. 367 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781 is the standard the Court should apply.

Plaintiffs raise two arguments in support of their claim. First, the cable operators argue that the must-carry provisions are content-based restrictions compelling them to carry the speech of broadcast stations, and as such run afoul of the First Amendment. Second, the cable programmers argue that the must-carry provisions unfairly prefer the "speech" of broadcasters over their First Amendment rights. Both of these arguments fail.

---

[5] At some point, technological innovation will enable cable systems to accommodate all broadcasters requesting carriage, thereby rendering "must carry" a problem of the past. Indeed, according to a April 6, 1993 article in the *Washington Post*, Telecommunication's Inc., the nation's largest cable television company, is about to "unveil an ambitious plan to rewire many of its cable systems with 7,000 miles of high-capacity, fiber-optic lines" over the next four years, which eventually will "enable TCI to deliver hundreds of TV channels [and] 'video-on-demand' programming" to its subscribers.

However, while fiber-optic and other technological innovations may be on the verge of a break through which may well cast a different light on Plaintiffs' First Amendment claims, such innovations have not yet realized their potential in the marketplace. In the context of today's technological landscape, the Cable Act of 1992 must be viewed as regulation designed to alleviate the adverse impact of the cable industries' growing monopolistic hold over the telecommunications industry.

A. *Operators' Claim*

It is well-established that under the protections afforded by the First Amendment individuals enjoy the right to speak or not to speak. The government cannot compel an individual to speak. *See*, e.g., *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977). The Supreme Court has extended this principle to apply to newspapers and to privately-owned newsletters in *Miami Herald Publishing Company v. Tornillo*, 94 S.Ct. 2831 (1974) and *Pacific Gas & Elec. v. P.U.C. of California*, 106 S.Ct. 903 (1986), respectively.

While the plaintiffs would have the Court extend the coverage of *Tornillo* and *Pacific Gas & Elec.* to the case at bar, these cases are inapposite to the arguments raised by Plaintiffs.

Tornillo broadly recognized the free speech rights of newspapers. *Tornillo* involved state action which penalized identifiable content-based speech and compelled transmission of a particular message. In that case, the Supreme Court once again made it clear that a statute which infringes on a newspaper's editorial rights is highly suspect under the First Amendment.

A continuum exists between compelled speech which is content based and that which incidentally relates to speech. While conflicting signals can be discerned from the case law on when regulations of business enterprises are content-based and when they are not, some First Amendment challenges lend themselves to the following maxim: You know it when you don't see it. This is such a case.

"Content-neutral" regulations are those that "are justified without reference to the content of the regulated speech." *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925, 929 (1986). In *Renton*, the Court found that a city zoning ordinance restricting the location of adult theaters was not aimed at the content, but rather at the secondary effects such theaters had on the surrounding community.

Perhaps more similar to the case at bar is *Regan v. Taxation with Representation*, 103 S.Ct. 1997 (1983). In that case, the

Supreme Court found 501(c)(3) of the Internal Revenue Code, which grants tax-exempt status to organizations organized and operated exclusively for certain statutorily-prescribed purposes, is constitutional. Like must-carry's distinction between cable programmers and broadcasters, §501(c)(3) clearly makes a statutory distinction between different groups of speakers. Finding "no indication that the statute was intended to suppress any ideas", the Court found that §501(c)(3) is not a content-based restriction on speech.[6]

Like the ordinance in *Renton* and the statute in *Regan v. Taxation With Representation*, the must-carry provisions plainly "are justified without reference to the content of the regulated speech" and there is "no indication that the statute was intended to suppress any ideas[.]" Must carry simply does not constitute a content-based restriction on cable operators' speech.

The right-of-reply statute in *Tornillo* and the California Public Utilities Commission's directive in *Pacific Gas & Elec.* plainly were based on the content of the regulated speech. But unlike the governmental actions involved in *Tornillo* and *Pacific Gas & Electric*, the must-carry provisions of the Cable Act of 1992 neither "penaliz[e] the expression of particular points of view [nor] force[] speakers to alter their speech to conform to an agenda which they do not set." *Pacific Gas & Elec*, 106 S.Ct. at 908. The must-carry provisions do not "restrict [Plaintiffs'] speech to certain topics or views or [] force [them] to respond to views that others may hold." *Id.*, at 909. Must-carry will not "impermissibly require[Plaintiffs] to associate with speech with which [they] may disagree" nor make them "feel compelled to respond to arguments and allegations made by [a local broadcaster] in its messages to [Plaintiffs'] customers." *Id.*, at 911.

---

[6] Section 501(c)(3) grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to animals[,]" provided that no substantial part of the activities of which consists attempting to influence legislation or supporting political candidates. 26 U.S.C. §501(c)(3).

Cable operators are left with ample channels to disseminate their own views, and there is nothing about sections 4 and 5 of the 1992 Cable Act which might cause a cable operator to "conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas." *Id.*, at 910 (citation omitted). Finally, "if experience with [the must-carry provisions] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Red Lion Broadcasting Co. v. F.C.C.*, 89 S.Ct. 1794, 1808 (1969).

Plaintiffs argue that the prohibition outlined in *Tornillo* and *Pacific Gas & Elec.* against governmental intrusion into the province of editorial discretion provides an independent basis leading the Court to apply strict First Amendment scrutiny to this case. In those cases, the clear content-triggered operation of the governmental regulation threatened to alter the mix of information chosen by the newspaper or newsletter at issue. Since neither a newspaper nor a newsletter is "a passive receptacle or conduit for news, comment, and advertising", *Tornillo*, 94 S.Ct. at 2840, such interference with the editor's function triggered heightened scrutiny.

While cable operators do exercise some control and judgment about the mix of overall programming they provide, such judgment does not entail the detail-oriented, content-based decisions made by the editors of newsletters, newspapers or other published sources of information. If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtably would run afoul of the First Amendment. But that is not what is presented in this case. Requiring cable operators to carry the programs of broadcasters, whatever the content of those programs may be, simply does not rise to the level of interference with editorial discretion which impinges on free speech or threatens to alter the mix of information available to the public.

B. *Programmers' Claim*

Plaintiff programmers challenge the must-carry provisions as impermissibly favoring the speech of broadcaster stations over that of cable programmers.

"Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification." *Regan v. Taxation With Representation*, 103 S.Ct. at 2001-2002. Programmers and broadcasters clearly are not constitutionally protected groups. And, having found that must-carry does not violate the First Amendment, heightened scrutiny is not warranted in this case.[7] Since I agree with Judge Jackson that the 1992 Cable Act passes muster under the rational relations standard of review, this argument fails.

Finally, it must be pointed out that the only challenge before this Court is provided under the First Amendment. No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision. Upholding the 1992 Act against Plaintiff's First Amendment challenge should in no way be taken as an endorsement of the legislation. Indeed, it may be preferable that the market be permitted to regulate itself. Of course, even the most avid proponents of free competition recognize that there cannot be effective free market competition without first eliminating the natural and not so natural monopolies that too many cable companies now enjoy.

III

Plaintiffs' attempt to substitute Congress' regulation of the cable industry with regulation by the First Amendment is mischievous. It is inconceivable that our forefathers at any time

---

[7] Moreover, a requirement that cable *operators* carry broadcast programming cannot be said to compel speech on the part of cable programmers. Thus, even if the First Amendment was implicated in this case, it is not clear that the programmers would have standing to assert this claim.

contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted.

Here, the Government has stepped aside to allow the private sector to perform signal transmission and allocation functions that the Government itself could have reserved for itself, without facing any conceivable First Amendment challenge by broadcasters or other programmers because of the regulatory method chosen. to the extent to which cable is performing a "public utility" function which the Government itself could perform, Congress certainly has the right to adopt reasonable regulations.

Congress has determined that cable companies' growing anti-competitive behavior and monopolistic power threatens the broadcast industry and the public's access to a wide array of local, public and educational programming. Congress decided to address this danger by enacting the Cable Act of 1992. In so doing, Congress was not motivated by a desire to stifle the speech of cable operators or programmers – indeed, ample channels remain open for their use – but by a desire to alleviate the effects of cable companies' monopolies and to preserve the diversity of voices represented by local, public and educational broadcasters. Whether there were other preferable ways of accomplishing Congress' objective is not for the Court to decide. So long as the method adopted by Congress is an appropriate one, it must stand and may not be second guessed by the judiciary. Consequently, I find that the Cable Act of 1992 does not run afoul of the First Amendment.

DATE 4/8/93

/s/Stanley Sporkin
Stanley Sporkin
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM, INC., *et al.*,	)	Civil Action No. 92-2247
Plaintiffs,	)	FILED
v.	)	APR 8 1993
FEDERAL COMMUNICATIONS COMMISSION, *et al.*	)	CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA
Defendants.	)	
DANIELS CABLEVISION, INC.,	)	
Plaintiff,	)	Civil Action No. 92-2292
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	
TIME WARNER ENTERTAINMENT COMPANY, L.P.,	)	
Plaintiff,	)	Civil Action No. 92-2494
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,	)	
Defendants.	)	

NATIONAL CABLE TELEVISION ASSOCIATION, INC., Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Civil Action No. 92-2495
DISCOVERY COMMUNICATIONS, INC., *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Civil Action No. 92-2558

DISSENTING OPINION

April 8, 1993

Turner Broadcasting System, Inc. v. FCC, No. 92-2247, et al.

WILLIAMS, *Circuit Judge*, dissenting: The must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") are ably set forth by the majority at pp. 3-6. In essence, they require cable operators to set aside just over a third of their channels for local broadcast stations. (The one-third-plus figure comprises both the commercial stations protected under § 4 of the Act and the non-commercial stations protected under § 5.) In addition, each privileged broadcast station has a right to its specific "channel position" on a cable system. 1992 Act at §§ 4(b)(6) and 5(g)(5).

In considering cable, Congress confronted a very real problem — one for which it has an easy remedy entirely consistent with the First Amendment. The problem is that cable systems control access "bottlenecks" to an important communications medium. In fact, while there are several thousand cable operators in the United States, only 53 communities are served by more than one operator. Debates, 138 Cong. Rec. S400, S436 (comments of Senator Gorton). There are well-developed regulatory responses to this sort of situation. The "bottleneck" holder may be ordered to serve all parties that meet neutral criteria for service. The Federal Communications Commission itself administers just such regulations in assuring that interstate long-distance telephone companies have access to local telephone networks. 47 U.S.C. § 202; and see, e.g., *MTS and WATS Market Structure Phase III*, 100 FCC 2d 860, 861 (1985) (adopting rules and policies relating to access). Indeed, courts have sometimes taken on the supervision of such compulsory access under the "essential facilities" doctrine of the antitrust laws. *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912). These solutions are, of course, imperfect; for example, they pose tricky pricing issues.[1] But mandatory access rules of this sort give no special privilege to one set of access seekers over another.

In fact, in 1984 Congress adopted provision for neutral, compulsory access to cable in § 612 of the Cable Communications Policy Act of 1984 ("1984 Act"), 47 U.S.C. § 532, a solution somewhat refined in § 9 of the 1992 Act. This provision entitles independent programmers to lease access on cable systems, at resonable prices to be set by the FCC. Although the channels available for lease under § 612 are limited to a specified proportion of each operator's channels (depending on the total number that the operator possesses, 47 U.S.C. §§ 532(b)(1)(a)-(d)), Congress remains free to expand the fraction of channels available. The only programmers excluded from the benefits of § 612 are those affiliated with the cable operator, i.e., the very ones who would be the likely beneficiaries of operator

---

[1] See, e.g., William J. Baumol, "Deregulation and Residual Regulation of Local Telephone Service", Ch. VII, American Enterprise Institute Studies in Telecommunication Deregulation (draft, March 3, 1993).

discrimination and who are therefore in no need of the law's intervention.

The must-carry provisions, by contrast, extend the privilege of access only to a special class of unaffiliated programmers — local commercial and non-commercial television stations. Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content — that they were "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." See 1992 Act, § 2(a)(11). Moreover, because of FCC licensing requirements, *every* such local broadcaster is legally bound to "provide programming responsive to issues of concern to its community." *Report and Order*, MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984). See also National Association of Broadcasters ("NAB") Corrected Memorandum at 24-25 (emphasizing force of mandate to carry local content). In other words, by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements.

A number of parties challenge these mandates, among them the cable operators who must carry local broadcast stations in place of their own choice of programming, and, even more significantly, the unaffiliated cable programmers, such as Discovery Network, producer of the Discovery and Learning Channels, whose programming will be supplanted. I shall apply current First Amendment analysis to their claims, but before doing so I think it useful to imagine a few hypothetical cases outside the area of cable. If the answers to those hypotheticals are as clear as I think they are, then — unless their is something terribly special about cable, apart from the bottleneck addressed by § 612 of the 1984 Act — the must-carry provisions must fall.

> 1. The Washington Post develops and patents a special "paper-springer" that enables it to deliver papers at a tiny fraction of others' costs. Assume that paper delivery costs represent a very large share of total costs, so that this technology is a source of overwhelming monopoly power. Congress decrees that

The Post must license the paper-springer — but only to publishers of local, neighborhood papers (i.e., not citywide ones). This cuts out The Washington City Paper, The Washington Informer, and The Washington Times.

2. A state is concerned that large shopping centers represent vital gathering places of citizens and that center owners may not willingly allow the sort of leafletting or soap-box oratory associated with a vibrant democracy. Accordingly it requires owners to allow such leafletting and oratory regardless of the leafletters' or speakers' message. See *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). But, finding that *local* residents are an especially important source of this vibrant debate, it limits the privilege to persons living within four miles of each shopping center. This excludes the proverbial "outside agitator".

These scenarios are in fact *less* troublesome under the First Amendment than the must-carry rules; the parties selected to benefit from the bottleneck-breaking rules are defined in content-neutral terms. Here, by contrast, the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy.[2]

---

[2] Government line-drawing in First Amendement cases can be analyzed both in terms of the distinction between content-based and content-neutral rules, and in terms of underinclusiveness. An underinclusiveness claim, when the classification is not content-based, is extremely weak; typically the law's challenger is saying in essence that the law should fall because it burdens *too little* speech. *See*, e.g., *Walsh v. Brady*, 927 F.2d 1229, 1236 (D.C. Cir. 1991). This seems counterintuitive, and such claims rarely prevail. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Here, however, the operators, and especially the independent cable programmers, do not say that the law fails because the burden is too narrow; they say it fails because the *beneficiaries* are so narrowly defined, and that the underinclusiveness thwarts rather than furthers the legitimate purpose of diversity. Even apart from the content-based character of the provision, then, the claim is stronger than the usual one of underinclusiveness.

Standard of Review. The standard of review in First Amendment cases usually depends on whether the regulation is content-based, leading to "strict scrutiny", *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), or content-neutral, leading to more relaxed scrutiny under the formul: *United States v. O'Brien*, 391 U.S. 367 (1980), as modified in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Here the statute is content-based under controlling precedent. The must-carry provisions mandate speech: they require cablecasters to carry the speech of local broadcast stations. As the Supreme Court held in *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781 (1988), "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act [mandating certain disclosures by charitable solicitors] as a content-based regulation of speech." *Id.* at 795. This alteration of content is equally certain here; under the must-carry mandate, cablecasters must replace the programs they would have chosen, regardless of origin, with programs selected by local broadcasters.

The *Riley* Court did *not*, however, immediately proceed to apply strict scrutiny. Rather, addressing a claim that the speech was basically commercial, the Court rejected that view on the ground that the commercial elements were "inextricably intertwined" with fully protected non-commercial speech. *Id.* at 796. More generally, it said that the Court's "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* While here we have no issue of commercial speech, I read the *Riley* analysis as a caution against assuming that all compulsions of speech, even fully protected speech, must receive strict scrutiny. We must look further.

Where a government regulation of *conduct* has an "incidental" burden on speech, the Court looks to whether the *interest* asserted by the government "is unrelated to the suppression of free expression", *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (internal quotations omitted), or, as the Court expressed it later

on the page, "unconnected to expression", *id.* Application of a test for "incidental" burdens on speech seems highly artificial here. Given the finite number of cable channels,[3] replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing "incidental" about the burden. Further, one of the interests explicitly asserted by Congress was the benefit of "local news and public affairs programming", 1992 Act, § 2(a)(11); and indeed the class of chosen beneficiaries is defined by other legal provisions as persons *bound* to include some minimum level of local programming content. Moreover, the Court applies strict scrutiny to rules that control editorial discretion, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), which surely comprises the choice of programs. See *Leathers v. Medlock*, 111 S. Ct 1438, 1442 (1991) (noting that cable "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press' "); see also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (noting that cable operators exercise significant editorial discretion).

On the other hand, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court assessed mandated speech without any explicit reference to strict scrutiny. The case hardly establishes that speech mandates need not pass such scrutiny, however. Free speech was on both sides of the balance in *PruneYard*, for the challenged state rule entitled *anyone* to engage in various expressive activities such as speaking and leafletting at shopping centers. The owner's only First Amendment claim was its right to silence, and the Court found that interest of little weight in context: the owner had dedicated the property to commercial use open to the public; it could readily disassociate itself from the ideas expressed; and the rule made

---

[3] There is uncontroverted evidence that 2000 cable systems, serving one-third of all subscribers, have no excess channel capacity. NCTA Statement of Material Facts at ¶ 6. It is further undisputed that there are many unaffiliated, non-broadcast programmers seeking access, but who will lose out because of the preferential treatment of broadcasters. *Id.* at ¶ 8; Klein Affidavit at ¶ 6.

no inroad into editorial functions. *Id.* at 87-88. While the Court did not use the language of strict scrutiny, the rule would likely have survived such review, given the state's purpose of assuring expressive opportunities on a completely nondiscriminatory basis, and the weakness of the shopping center's competing speech interests. Thus *PruneYard* cannot reasonably be taken to allow speech mandates to escape strict scrutiny.

The Supreme Court has also developed rules governing the First Amendment evaluation of taxes on the media. While the must-carry regulations are not in form taxes, they are in substance indistinguishable from a tax-subsidy combination — a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters to enable them to lease cable channels. The Court has insisted on a "compelling justification" for any use of the taxing power "to single out the press". *Leathers*, 111 S. Ct. at 1443; see also *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Where a tax not only singles out the press but "targets a small group of newspapers", even by entirely content-neutral categories, the government must carry a "heavy burden" to sustain the distinction. *Id.* at 591, 592-93. See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (imposing "heavy burden" of justification for tax that singles out a subject of the press for a special tax, based on broad content categories).

Leathers itself, of course, upheld a tax statute that distinguished between cable operators and broadcasters, and indeed specified that in the context of a generally applicable tax the distinction was *not* subject to heightened scrutiny. 111 S. Ct. at 1444-47. Although the Court observed broadly that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas", *id.* at 1447, the observation was in the context of a "broad-based, content-neutral sales tax" that fell on virtually every good or service sold in Arkansas, *id.* The treatment of First Amendment values as irrelevant cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of their competitors — a class whose

programming must, as a matter of law, include content of a type specified by the government. Accordingly, I conclude that the proper test is strict scrutiny.

Application of the test. To survive strict scrutiny, regulation of speech must serve a "compelling" governmental purpose and its "means must be carefully tailored to achieve those ends." *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). First we must identify the government's interests, and then assess the fit between each of those interests and the must-carry requirements.

The Senate Report articulated the congressional interests as follows:

> (1) preserving the benefit of local television service, particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace.

S. Rep. 102-92 at 58. These purposes are reflected in §§ 2(6)-(15) of the Act. Because this statement of purposes involves some overlap, the analysis will be clearer if we reformulate them as follows: (A) preservation of open access to cable in order to assure diverse programming (see purposes (2) and (3) above); and (B) preservation of local broadcasting (see purposes (1) and (3) above). This second reason involved not only a desire to promote "local news and public affairs programming", see § 2(a)(11) of the Act, but also a wish to assure that local broadcasters could continue to serve those persons who either did not, or could not, subscribe to cable. I address diversity first, then the preservation of local broadcasters.

Open Access for Diverse Programming

I assume that, at least at some level of abstraction, the interest in promoting diversity of views on cable is compelling. With regard to the broadcast spectrum the Court has characterized programming diversity as an "important governmental objective", *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct.

2997, 3011 (1990), and a lengthy passage in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. at 247-54, though inconclusive, appears to regard the interest in correcting newspaper monopolies as extremely valuable. In *Tornillo*, however, the Court balked at the state's remedy — a right-of-reply statute — on the ground that it would interfere with editorial discretion. The interference took two forms: *first*, the statute compelled "editors or publishers to publish that which reason tells them should not be published", *id.* at 256 (internal quotations omitted), and *second*, it tended to dissuade editors from publishing those controversial statements that would trigger the right of reply, *id.* at 257. Framing the case in modern doctrine, the Court may be said to have found the solution too intrusive to satisfy the requirement of careful "tailoring".

Here, too, the fit between the interest and the regulation is extremely weak. It is far from clear that giving local broadcasters an entitlement to be carried will increase program diversity *at all*. Because cablecasters now carry the vast majority of local stations (as explained further below), the must-carry rules may have little effect, but where they have any, it will be only to replace the mix chosen by cablecasters — whose livelihoods depend largely on satisfying audience demand — with a mix derived from congressional dictate.

Moreover, in considering "fit" one must look at the available alternatives. As the Court said recently in assessing the fit of a statute that burdened commercial speech, "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 61 U.S.L.W. 4272, 4274 n.13 (U.S. March 24, 1993). Here, one obvious alternative is expansion of the access provisions of § 612 of the 1984 Act. Those access provisions are far less burdensome — in the critical sense of minimizing government interference in the choice of *who* will have access to cable. Under § 612, *all* programmers are eligible for leased access except the ones that don't need it — the affiliates of a cable operator. 47 U.S.C. § 532(b)(1).

Even neutral remedies such as § 612 are subject to challenge under *Tornillo*, as they replace the cablecaster's speech with that of others. But a number of distinguishing factors argue for upholding the leased access solution. First, a relatively large number of channels is available (ranging from the teens up to 40, 50 and more), so that the scope of the monopolization is greater than in *Tornillo*. Second, the channels are discrete, so that viewers will be less likely to attribute all speech on all channels to the cablecaster. And there is no chilling effect on the cablecaster's programming of the remaining channels. Finally, the benefitted group precisely fits the legislative concern — all unaffiliated programmers.

The last is conspicuously missing from must-carry. The difference between the two is the difference between the state rule upheld in *PruneYard Shopping Center* and the hypothetical set forth at the start of this opinion — a *PruneYard*-type entitlement limited to a specific class of would-be speakers defined in terms of their location. Indeed, the must-carry requirements are worse than the *PruneYard* hypothetical, for admission to the privileged class requires, as a matter of law, the carrying of specific program content.

It is quite true, of course, that Congress found in 1992 that leased access under § 612 has not been as effective as predicted in 1984, pointing to cumbersome enforcement procedures and undue cablecaster control over prices and other conditions of access. See H. Rep. 102-628 at 39-40. But the Report went on to "restate[]" the Committee's "belief that access requirements establish a form of content-neutral structural regulation 'which will foster the availability of a diversity of viewpoints to the listening audience'. " *Id.* at 40. More important, to the extent that Congress spotted defects in § 612, it set out to correct them. The 1992 Act amends § 612 by clarifying and broadening the FCC's authority to set maximum reasonable rates and other reasonable terms and conditions for access. See 1992 Cable Act, § 9. Given § 612, and Congress's authority to expand its scope, the must-carry rules do not provide a reasonable fit with the diversity rationale.

Preservation of Local Broadcasting

The second interest that Congress has invoked is the preservation of local broadcasting. Section 2(a)(10) of the Act is explicit: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." In part this interest derived from the local content of such broadcasting – "an important source of local news and public affairs programming." 1992 Cable Act § 2(a)(11). But in addition the interest derived from an indirect concern for the households not served by cable – both those unwilling or unable to pay for the service and the 10% for whom such service is physically unavailable. Here Congress reasoned that if broadcast stations ever lost the advertising revenues attributable to the audiences they reach through cable service, they would be driven from business and thus be unable to provide service for those without cable. There was also special concern that local broadcast stations were exceptionally vulnerable as potential victims of cablecaster bottleneck control, because of their competition with cable for advertising revenue. See 1992 Act, § 2(a)(14)-(16). I will first address the issue of local content, then the preservation of over-the-air service.

Local content. It seems extremely doubtful that forcing local affairs content on First Amendment speakers could ever qualify as a compelling interest (at least outside the special preserve of broadcasting itself, to which I return below). If government "may not select which issues are worth discussing or debating in public facilities", *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), it is hard to see why it may do so on private facilities.

Even if by some stretch an interest in local content were "compelling", far less restrictive means are readily available. Congress is free to subsidize favored speech if the market is too weak to sustain the quantity that Congress seeks. See, e.g., *Rust v. Sullivan*, 111 S. Ct 1759, 1774 (1991); cf. *Regan v. Taxation with Representation*, 461 U.S. 540, 544-48 (1983); compare *Arkansas Writers' Project* (striking down content-based tax burden).

Given those means, Congress cannot advance specific content by requiring a competing class of First Amendment speakers to carry the favored speech. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Preserving over-the-air TV service. I assume that as an abstract matter government has a compelling interest in assuring access to TV for those unwilling or unable to subscribe to cable, and especially those beyond cable's physical reach. The first difficulty with the argument here is that there is no evidence that this access is in jeopardy. The interest, as the Court said of a concern for breaches of the peace in *Texas v. Johnson*, 491 U.S. 397 (1989), simply "is not implicated on this record". *Id.* at 407.

The most plausible evidence would be of local TV stations going under and of licensees turning in their licenses. Nothing remotely like that is in sight — the facts show quite the opposite. Plaintiff National Cable Television Association asserts (without contradiction) that in the years since the D.C. Circuit Court of Appeals invalidated the FCC's first effort at must-carry, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), the number of commercial broadcast stations has *increased* by 22% (from 919 to 1118), the number of educational broadcast stations by 15% (from 316 to 363), and the number of cities receiving broadcast television by 16% (from 514 to 594). NCTA's Statement of Material Facts ¶¶ 12-14. Thus, not only are licenses not being turned in for want of profitable opportunities, but evidently entrepreneurs continue to seek the additional licenses that the FCC makes available. As a result, they are both deepening and spreading the coverage of over-the-air TV. Whatever risk there may be in the abstract has completely failed to materialize.

Defendants and defendant-intervenors urge in response that this record means little; since *Quincy*, the shadow of possible congressional intervention has fallen across the cable industry, causing operators to be less ruthless than they would be if must-carry were invalidated. Remove the shadow, they claim, and the operators will show their true monopolist colors.

This argument is incurably flawed. If the constitutionally fatal aspect of the must-carry rules is the absence of evidence of any visible threat to the over-the-air TV industry, then the rules would become constitutional the minute the industry was visibly threatened. Accordingly, cablecasters would continue to operate under the same shadow of congressional intervention, and over-the-air TV would continue to thrive. Invalidation of must-carry for want of evidence would preserve the supposedly necessary threat.

Supporters of must-carry thus turn to evidence of (1) instances where cablecasters have actually dropped broadcast stations and (2) structural relationships in the industry, which, they say, indicate the threat is real. Indeed, in its findings, Congress noted a "marked shift in market share from broadcast television to cable television", 1992 Act, § 2(a)(13), and also endorsed the structural argument, *id.* at §§ 2(a)(12) (14-15).

The congressional finding on *actual* effects is not disputed — nor is it supportive of must-carry. That cable has grown faster than broadcast does not in the slightest suggest that broadcast is in peril.

The record before Congress did, however, include evidence of some cable operators' dropping broadcast channels. Specifically, the Senate Report cites evidence that, of 4303 cable systems disclosing data, 869 had dropped one or more local stations in a total of 1,820 instances.* S. Rep. 102-92 at 43. Because only half of the more than 8000 cable systems disclosed data, the committee extrapolated to find that approximately 1700 cable systems have denied carriage in approximately 3600 instances. *Id.*

These facts do not support an inference that over-the-air TV is at risk. First, they indicate (by simple subtraction) that 80% of cable systems have never dropped a single local broadcaster.

---

* Clearly some stations were dropped on more than one occasion, indicating that being dropped must in many instances have been temporary. We have not been directed to any evidence of how many stations may have been permanently dropped.

Second, it is impossible to know what to make of the 3600 estimated instances of dropping when we do not know either the percentage of total broadcasters that the figure represents or the character of the broadcast channels dropped. What pertinent data there is on the record states that the average cable system in 1990 carried just over eight local broadcast signals (7% *more* than were carried in 1985). Klein Affidavit at ¶ 13. Taking Congress's figure of over 8000 cable systems, this would indicate that there are at least 64,000 local broadcast signals being carried on cable systems (clearly this figure counts single stations multiple times, just as does the raw figure on drops). Next to this figure, the 3600 instances of droppage[5] do not support an inference of peril to the broadcast industry or even any segment of that industry. In fact, plaintiff NCTA submits further, uncontradicted evidence that in 1988, well after the FCC must-carry rules had been struck down, 98% of all the broadcast stations that would have qualified for mandatory carriage were still being carried despite the absence of such a requirement. Klein Affidavit at ¶ 12.

There is furthermore no information about the characteristics of the broadcasters actually dropped. Such distinctions are important. Plaintiff Time-Warner Entertainment ("TWE") alleges without contradiction that the must-carry rules will require it to carry, in its Staten Island, New York line-up, not one but *two* stations from Bridgeport, Connecticut. TWE Memorandum in Support of Motion for Summary Judgment at 12. If many of the stations dropped have as remote a link to the dropping cablecaster's market as do these Bridgeport stations, it would explain why the cable operators' right to drop has coexisted with the broadcast industry's continued growth. Thus we have *nothing* to connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious.

The structural argument is that the competition between cable and broadcast for advertising revenue gives cable operators an

---

[5] The record doesn't indicate the time frame within which these drops occurred. If it was a period of years, this even further weakens the inferential chain.

incentive to drop broadcast stations. See 1992 Act, §§ 2(a)(12), (14-15). (Taken at its best, this theory would lend *no* support to § 5 of the Act (relating to noncommercial TV), as the educational stations do not advertise.) The evidence cited in the Senate Report consists of a projected 17% growth rate in cable advertising revenues. S. Rep. 102-92 at 44. Yet rapid growth in advertising seems easily attributable to the growth of cable, and perhaps some branching into advertising-supported programs. In itself, it shows neither a purpose to undermine broadcast TV nor the start of a campaign to do so. Broadcast television evidently still accounts for 92 of all television advertising revenues. See Hendricks Declaration at ¶ 22(d).[6]

Further, cable television appears to continue to be dependent on local broadcasters as critical suppliers of programming. Congress explicitly found that "broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations." 1992 Act, § 2(a)(19). In fact, local broadcaster programming accounts for approximately two-thirds of total cable viewing hours. S. Rep. 102-92 at 35. Moreover, the ratio of cable subscription fee revenues to advertising revenue is

---

[6] The National Association of Broadcasters points to evidence before Congress that on some occasions cablecasters repositioned broadcast channels and placed less popular programs at the former broadcast position. NAB Corrected Memorandum, etc. at 22. This is urged as confirmation that cable operators will pursue advertising revenue at the expense of viewer satisfaction. At oral argument cable representatives noted in response that the data referred to periods immediately after the switch, when the new programs had little or no reputation with audiences. In any event, the reasoning of the broadcasters is hard to follow, and seems especially ironic coming from firms that depend exclusively on advertising revenues. Broadcasters might well increase their audiences by dropping advertisements, but no one expects them to do so; it is recognized that they accept detriments to audience satisfaction where justified by increases in net revenue. That cable operators may make some such calculations is no evidence of anticompetitive purpose. In fact, because cable operators' revenues are overwhelmingly due to subscription fees, see below, advertising seems likely to be less common on cable.

evidently 25:1. TWE Reply Memorandum in Support of Motions for Summary Judgment at 15. So long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broadcast channels to any significant degree.

Finally, even if local broadcasters were in perceptible peril, it would not follow that Congress could secure their survival by must-carry provisions. Again, less intrusive alternatives are obvious. First, if evidence of any risk should appear, Congress could get broadcast TV into the homes of cable viewers (and thus preserve the stations' advertising revenues) by expanding leased access under the neutral provisions of § 612 of the 1984 Act. Second, if broadcasters' programs were not popular enough to enable them to pay the leasing fees set by the FCC, Congress could subsidize the difference to the extent necessary. Compare *Rust v. Sullivan*, 111 S. Ct. at 1774.

In reaching these conclusions, I do not question Congress's power to engage in critical fact-finding. The degree of deference that we owe such findings is hotly disputed between the parties. *Compare* NCTA Reply Memorandum at 41-42 (citing *Sable Communications of California v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978), *with* DOJ Answer at 37 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 572 (1990). My view does not turn on any resolution of that dispute, because the legislative findings simply do not support the inferences needed to sustain must-carry. The problems are that (1) there is *no* finding of any present or imminent harm; (2) the evidence of some dropping of broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must-carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5), even if the hazard were perceptible, the record does not address the less intrusive alternatives. If findings as scantily connected to the conclusion as these can justify must-carry, then the door is open — even in the area of First Amendment

rights — to exercise of the most naked interest-group preferences. Cf. Cass R. Sunstein, "Naked Preferences and the Constitution", 84 Colum. L. Rev. 1689 (1984).

Thus I conclude that — unless the analysis of First Amendment issues in the special context of *broadcast* for some reason supervenes — the must-carry provisions violate the First Amendment.

Proposed Use of Broadcast Analysis

Some defendants urge the court to use the sort of diluted First Amendment analysis applied to broadcasting in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). DOJ Answer at 26; NAB Corrected Memorandum, etc. at 46. Use of the broadcast standards would be completely inappropriate.

The weakened status of broadcasters under the First Amendment arose from the Supreme Court's conclusion that discretionary government allocation of channels was necessary for the orderly use of the broadcast medium — or at any rate that such allocation was not materially more intrusive on First Amendment values than any visible alternative. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943), the Court upheld the FCC's so-called "Chain Broadcasting" regulations (aimed at preventing monopolization of radio licenses) against a variety of statutory challenges and a First Amendment claim. "[R]adio inherently is not available to all." *Id.* at 226. "That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Id.* Thus, "The right to free speech does not include . . . the right to use the facilities of radio without a license." *Id.* at 227.

Although the precise question was not before it, the Court appeared to assume that these factors logically entailed discretionary government allocation of licenses, so that such allocation presented no First Amendment problem so long as the choice was not openly based on the applicants' "political, economic or social views, or upon any other capricious basis." *Id.* at

226.[7] This of course overlooked content-neutral bases for handling the problems, such as (1) the rule of first possession, which in fact preceded government allocation and tracked the doctrine of prior appropriation,[8] (2) auctions, and (3) lotteries.[9] These content-neutral alternatives evidently went by default, as those raising the First Amendment claims — the incumbent broadcasters — had no incentive to undermine the system under which they held their own quasi-monopoly licenses. *NBC* of course paved the way for *Red Lion*, which upheld, for the broadcast medium, the sort of government-managed right to respond that the Court later struck down for the print media in *Tornillo*. *Compare Red Lion*, 395 U.S. at 386-401, *with Tornillo*, 418 U.S. at 247-58. Here, of course, not even the defendants or defendant-intervenors suggest that discretionary allocation of channels is necessary or even appropriate to preserve access to cable. In the face of § 612, such a claim would be untenable.

Defendants and defendant-intervenors, however, seeking to deny cable operators full First Amendment protection, point to three special characteristics of cable that in their view justify government management of the channels: (1) the cable operators' need for rights-of-way, along or under city streets, in order to lay their cable; (2) the cable industry's prior enjoyment of special government privileges; and (3) the ability of cable operators to engage in "private censorship" against the speech of broadcasters. Neither alone nor in the aggregate do these justify subjecting cable to diminished First Amendment protection.

Rights-of-way. State, city and county governments have property interests in the streets, so that the placement of cable commonly requires government consent. There may also be instances

---

[7] I use the qualifying adverb "openly" advisedly. Careful research suggests, as anyone would expect, that often the political allegiance of applicants has been critical in license allocation. See, e.g., Lucas A. Powe, Jr., American Broadcasting and the First Amendment 68-84 (1987).

[8] See Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & Econ. 133, 147-52, 163 (1990).

[9] Cf. 47 U.S.C. § 309(i).

where the federal government holds a proprietary interest essential to the laying of cable. These governments may seek to condition their consents on the operators' waiver or abandonment of their First Amendment rights. If so, courts would presumably assess these efforts under the doctrine of unconstitutional conditions. *Elrod v. Burns*, 427 U.S. 347, 357-60 (1976); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984) (state method of calculating charges for use of right-of-way invalidated under negative commerce clause), aff'd 471 U.S. 81 (1985); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 128-29 (7th Cir. 1982). We need not speculate on how such cases would work out. Here the federal government is not attaching conditions to the grant of a property interest; it is acting in a purely regulatory role. It cannot lean on proprietary powers that are out of the picture.

Prior benefits. Defendants argue that cable's initial growth depended, perhaps essentially, on government assistance in securing the right to retransmit the programs of broadcast channels, free of charge. See 17 U.S.C. § 111, as amended (compulsory copyright access); see DOJ Memorandum in Support of Motion to Dismiss at 27-28. This history seems completely irrelevant. If the Union Pacific Railroad were to own a newspaper, its history as a recipient of government largesse on a grand scale would surely not condemn it to second-class First Amendment protection. Of course *current* federal government benefits would provide an opportunity for attachment of conditions; but again, just what conditions might prove justifiable in the face of the unconstitutional conditions doctrine is not before us. With the adoption of § 6 of the 1992 Act, Congress gave broadcast stations an unequivocal right to withhold consent to retransmission.

Cablecasters' power to censor. Finally, intervenor-defendant NAB argues that cable operators can use their position to censor broadcasters. NAB Corrected Memorandum at 46. This argument amounts to nothing more than a reiteration of the fact that cable operators control a bottleneck. The mere fact that such control might force some programmers to find different ways to reach the public (which all programmers have via § 612,

and which broadcasters uniquely have via the airwaves) does not give the government any right to force access on behalf of a preferred class of speakers. This follows *a fortiori* from *Tornillo*.

In short, the special character of cable is limited to one feature: bottleneck control of access to an important medium. A straightforward, speech-neutral solution to that problem exists and has already been employed by Congress in § 612 of the 1984 Act, as amended by § 9 of the 1992 Act. I see no constitutional obstacle to the expansion of that solution if Congress should deem it appropriate. Given the availability of that remedy (together with such subsidies as Congress might find suitable), I do not see how Congress can constitutionally deny cable operators the ordinary rights of any First Amendment speaker.[10]

---

[10] Because of my conclusion on the First Amendment challenge to the must-carry provisions, I do not reach the contention of TWE and Daniels that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however, regard the claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to "physical" occupations of "real property". See NAB Opposition at 33. But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property.

NAB also argues that cable operators have no "historically rooted expectation of compensation" for the right to use their cable services, see *Loretto*, 458 U.S. at 441, evidently because of (1) local governments' practices of imposing carriage requirements as a condition of granting franchises and right-of-way access, and (2) prior similar federal impositions, seemingly granted in exchange for privileged entitlements to retransmit broadcasters' signals. Both seem of limited relevance for the reasons discussed above in connection with the parallel *Red Lion* theories: the local governments are not involved here, and the federal government has removed the quid for which it now seeks a quo.

Conclusion

The must-carry regulations in the 1992 Cable Act clearly burden the protected speech of cable operators, in favor of local broadcasters whose programming content is in material part specified by law. In requiring cable systems to carry a special group of competing speakers, Congress directly, not incidentally, restricts the cable operators' exercise of editorial discretion. None of the interests advanced by Congress supports such a burden. The diversity rationale fits poorly with mandatory carriage of a specific group of programmers, being served with neutrality by § 612's provision for leased access. Although the interest in protecting over-the-air TV for non-cable-subscribers may be compelling in the abstract, the findings in the record neither indicate any real threat nor suggest any flaw in the less burdensome and obvious means for addressing any such threat. For these reasons, I respectfully dissent, and would declare the must-carry provisions to be unconstitutional abridgments of the First Amendment rights of cable operators and unaffiliated programmers.

/s/Stephen F. Williams

Stephen F. Williams
United States Circuit Judge

the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.".

47 USC 543 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 180 days after the date of enactment of this Act, except that the authority of the Federal Communications Commission to prescribe regulations is effective on such date of enactment.

SEC. 4. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 613 (47 U.S.C. 533) the following new section:

"SEC. 614. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS.

47 USC 534.

"(a) CARRIAGE OBLIGATIONS.—Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b).

"(b) SIGNALS REQUIRED.—

"(1) IN GENERAL.—(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete

from carriage by that system any signal of a broadcast television station.

"(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

"(2) SELECTION OF SIGNALS.—Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that—

"(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

"(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

"(3) CONTENT TO BE CARRIED. — (A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other non-programmed material (including teletext and other

subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

"(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

"(4) SIGNAL QUALITY. –

"(A) NONDEGRADATION; TECHNICAL SPECIFICATIONS.– The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

"(B) ADVANCED TELEVISION.–At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

"(5) DUPLICATION NOT REQUIRED.—Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on it system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

"(6) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

"(7) SIGNAL AVAILABILITY.—Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator

authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

"(8) IDENTIFICATION OF SIGNALS CARRIED.—A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

"(9) NOTIFICATION.—A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(10) COMPENSATION FOR CARRIAGE.—A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

"(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

"(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17, United States Code, as indemnification for any increased copyright liability resulting from carriage of such signal; and

"(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

"(c) LOW POWER STATION CARRIAGE OBLIGATION. –

"(1) REQUIREMENT.–If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b)–

"(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

"(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

"(2) USE OF PUBLIC, EDUCATIONAL, OR GOVERNMENTAL CHANNELS.–A cable operator

required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

"(d) REMEDIES.—

"(1) COMPLAINTS BY BROADCAST STATIONS.—Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

"(3) RESIDENTIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

"(e) INPUT SELECTOR SWITCH RULES ABOLISHED.—No cable operator shall be required—

"(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

"(2) to provide information to subscribers about input selector switches or comparable devices.

"(f) REGULATIONS BY COMMISSION.—Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

"(g) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS.—

"(1) CARRIAGE PENDING PROCEEDING.—Pending the outcome of the proceeding under paragraph (2), nothing in this Act shall require a cable

operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

"(2) PROCEEDING CONCERNING CERTAIN STATIONS.—Within 270 days after the date of enactment of this section, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to non-broadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a). In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely

because their programming consisted predominantly of sales presentations or program length commercials.

"(h) DEFINITIONS.–

"(1) LOCAL COMMERCIAL TELEVISION STATION.–

"(A) IN GENERAL.– For purposes of this section, the term 'local commercial television station' means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 615(1)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

"(B) EXCLUSIONS.–The term 'local commercial television station' shall not include –

"(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

"(iii) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of –45dBm for UHF

signals or −49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

"(C) MARKET DETERMINATIONS.– (i) For purposes of this section, a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

"(ii) In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as –

"(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

"(II) whether the television station provides coverage or other local service to such community;

"(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of

concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

"(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

"(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

"(iv) In the rulemaking proceeding required by subsection (f), the Commission shall provide for expedited consideration of requests filed under this subparagraph.

"(2) QUALIFIED LOW POWER STATION.—The term 'qualified low power station' means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if —

"(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

"(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the

provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

"(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

"(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

"(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 25,000; and

"(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this section.".

SEC. 5. CARRIAGE OF NONCOMMERCIAL STATIONS.

Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 et seq.) is further amended by inserting after section 614 (as added by section 4 of this Act) the following new section:

"SEC. 615. CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION.

47 USC 535

"(a) CARRIAGE OBLIGATIONS.—In addition to the carriage requirements set forth in section 614, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

"(b) REQUIREMENTS TO CARRY QUALIFIED STATIONS.—

"(1) GENERAL REQUIREMENT TO CARRY EACH QUALIFIED STATION.—Subject to paragraphs (2) and (3) and subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

"(2)(A) SYSTEMS WITH 12 OR FEWER CHANNELS.—Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

"(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

"(i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station;

"(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

"(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

"(3) SYSTEMS WITH 13 TO 36 CHANNELS.—(A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels —

"(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

"(ii) may, in its discretion, carry additional such stations.

"(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

"(C) The cable operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional

qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

"(D) A cable operator of a system described in this paragraph which increase the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

"(c) CONTINUED CARRIAGE OF EXISTING STATIONS.—Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

"(d) PLACEMENT OF ADDITIONAL SIGNALS.—A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

"(e) SYSTEMS WITH MORE THAN 36 CHANNELS.—A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially

duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

"(f) WAIVER OF NONDUPLICATION RIGHTS.—A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

"(g) CONDITIONS OF CARRIAGE.—

"(1) CONTENT TO BE CARRIED.—A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

"(2) BANDWIDTH AND TECHNICAL QUALITY.—A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and

shall carry the signal of each qualified local noncommercial educational television station without material degradation.

"(3) CHANGES IN CARRIAGE.—The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(4) GOOD QUALITY SIGNAL REQUIRED.—Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

"(5) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the

station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

"(h) AVAILABILITY OF SIGNALS.—Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

"(i) PAYMENT FOR CARRIAGE PROHIBITED.—

"(1) IN GENERAL.—A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headed of the cable system.

"(2) DISTANT SIGNAL EXCEPTION.—Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c), where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

"(j) REMEDIES.—

"(1) COMPLAINT.—Whenever a qualified local noncommercial educational television station believes

that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall accord such cable operator an opportunity to present data, views, and arguments to establish that the cable operator has complied with the signal carriage requirements of this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"(k) IDENTIFICATION OF SIGNALS.—A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

"(l) DEFINITIONS.—For purposes of this section —

"(1) QUALIFIED NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified noncommercial educational television station' means any television broadcast station which —

"(A)(i) under the rules and regulation of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

"(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B); or

"(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

"(2) QUALIFIED LOCAL NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified local noncommercial educational television station' means a qualified noncommercial educational television station —

"(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

"(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system".

Supreme Court, U.S.
FILED
AUG 4 1993
OFFICE OF THE CLERK

No. 93-45

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the
VISION INTERFAITH SATELLITE NETWORK, *et al.*,
Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the District of Columbia

JOINT MOTION TO AFFIRM

COLBY M. MAY
JOSEPH E. DUNNE III
MAY & DUNNE, CHARTERED
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 298-6345

STUART J. ROTH
CHRISTIAN ADVOCATES SERVING EVANGELISM
120 Zeigler Circle E.
Mobile, AL 36608
(205) 633-2154

JAY ALAN SEKULOW
Counsel of Record
THOMAS PATRICK MONAGHAN
JAMES MATTHEW HENDERSON, SR.
MARK N. TROBNICK
J. DAVID ETHERIEDGE
JOEL H. THORNTON
CHRISTIAN ADVOCATES SERVING EVANGELISM
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Appellees Trinity Christian Center of Santa Ana, Inc. (d/b/a Trinity Broadcasting Network), Tri-State Christian TV, Inc., National Minority TV, Inc. and, All American TV, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Congress adopted the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act") to promote growth and diversity in cable television services, to provide for protection of cable television consumers in the absence of effective competition, and to address and cure problems presented by undue market power of cable systems. Sections 4 and 5 of the Act require cable systems to carry the signals of licensed broadcast television stations. Appellants National Interfaith Cable Coalition, Inc. and Atlanta Interfaith Broadcasting challenged §§ 4 and 5 of the Cable Act facially, alleging that the "must carry" provisions violate both Religion Clauses. In the view of the Appellees, the following questions are presented:

1. Is consideration of the Establishment Clause challenge to the Cable Act appropriate in this case, in which the decision below rests on the well-settled precedents of this Court regarding facial challenges asserting violations of the Establishment Clause?

2. Was not the district court correct in its holding that §§ 4 and 5 of the Cable Act do not violate the Establishment Clause, when those sections are scrutinized in accordance with the three-part test established in *Lemon v. Kurtzman,* 403 U.S. 602 (1971)?

3. Was not the district court correct in its holding that, because the benefits which §§ 4 and 5 of the Cable Act provide to local broadcasts that carry predominantly religious formats are merely incidental to the broad impact of the Cable Act, the Act does not violate the Establishment Clause?

4. Is consideration of the Free Exercise of Religion Clause challenge to the Cable Act appropriate in this case, in which the district court relied on the well-settled precedents of this Court regarding facial challenges asserting violations of the Free Exercise of Religion Clause?

5. Was not the district court correct in its holding that §§ 4 and 5 of the Cable Act are neutral laws of general applicability which do not violate the Free Exercise Clause?

LIST OF ADDITIONAL PARTIES TO THE PROCEEDING BELOW

The Appellants' list of parties to the proceeding, *see* Joint Jurisdictional Statement at iii, erroneously omitted from the list of Defendants-Appellees, the following parties, who jointly file this motion to affirm:

Trinity Christian Center of Santa Ana, Inc., doing business as Trinity Broadcasting Network;

Tri-State Christian TV, Inc.;

National Minority TV, Inc.; and,

All American TV, Inc.*

---

* In the district court, these Appellees were referred to collectively as "Specialty Broadcasters." Hereinafter, the Appellees filing this Motion To Affirm are referred to collectively as "Broadcasters."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ADDITIONAL PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	v
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	2
Fact Summary	2
The Decision Below	4
REASONS FOR AFFIRMING THE JUDGMENT BELOW	7
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE	10
A. The Predominant Purpose Of The Cable Act Is To Encourage Competition And Thereby Benefit The Consumer	11
B. The Primary Effect Of The Cable Act Is To Promote Competitive And Diverse Cable Programming	13
C. No Excessive Entanglement Results From Providing "Must Carry" Access For Broadcasters Providing Religious Programming	16

TABLE OF CONTENTS—Continued

Page

II. THE CABLE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT REGULATES A BROAD RANGE OF SECULAR CABLE ACTIVITY, ONLY INCIDENTALLY BENEFITTING RELIGIOUS BROADCASTERS 19

III. BARRING RELIGIOUS BROADCASTERS FROM PARTICIPATION IN A FACIALLY NEUTRAL PROGRAM OF GOVERNMENT BENEFITS DEMONSTRATES HOSTILITY TO RELIGION 26

IV. NO FREE EXERCISE OF RELIGION ISSUE IS PRESENTED BY THE "MUST CARRY" RULES OF THE CABLE ACT 28

CONCLUSION 30

ADDENDA:

A. Order, U.S. District Court for the District of Columbia (Mar. 1, 1993) 1a

B. Affidavit of Robert Higley with attachments (filed Feb. 12, 1993) 3a

TABLE OF AUTHORITIES

Cases	Page
Board of Education v. Allen, 392 U.S. 236 (1968)	18, 19
Board of Education v. Mergens, 496 U.S. 226 (1990)	14, 15, 18, 20, 26-27
Bowen v. Kendrick, 487 U.S. 589 (1988)	10, 19, 20, 21, 24-25
Church of the Lukumi Babalu Aye v. City of Hialeah, Florida, 113 S.Ct. 2217 (1993)	7, 28
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	5, 20
Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980)	19, 21
Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987)	27
Employment Div. v. Smith, 494 U.S. 872 (1990)	7, 28
Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582 (1981)	9, 14, 17
Harris v. McRae, 448 U.S. 297 (1980)	10, 11, 13
Hernandez v. C.I.R., 490 U.S. 680 (1989)	6
Hunt v. McNair, 413 U.S. 734 (1973)	19, 21
Jones v. Wolf, 443 U.S. 595 (1979)	15
King's Garden, Inc. v. Federal Communications Commission, 498 F.2d 51 (D.C. Cir. 1974)	9
Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993)	7, 10
Lee v. Weisman, 112 S.Ct. 2649 (1992)	5, 16
Lemon v. Kurtzman, 403 U.S. 602 (1971)	i, 5, *passim*
Lynch v. Donnelly, 465 U.S. 668 (1985)	12, 15, 24
Marsh v. Chambers, 463 U.S. 783 (1983)	18
McDaniel v. Paty, 435 U.S. 618 (1978)	18
Mueller v. Allen, 463 U.S. 388 (1983)	18, 20, 21-23, 25
Noe v. Federal Communications Commission, 260 F.2d 51 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959)	9
Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976)	16, 19, 25
Tilton v. Richardson, 403 U.S. 672 (1971)	19, 21
Turner Broadcasting System Inc. v. Federal Communications Commission, 819 F. Supp. 32 (D.D.C. 1993), *appeal filed*, No. 93-44 (July 2, 1993)	2, *passim*

TABLE OF AUTHORITIES—Continued

Page

Walz v. Tax Commission, 397 U.S. 664 (1970) 21
Widmar v. Vincent, 454 U.S. 263 (1981) 15, 17, 20
Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986) 15, 20, 21, 23-25
Wolman v. Walter, 433 U.S. 229 (1977) 21
Wooley v. Maynard, 430 U.S. 705 (1977) 29-30
Zobrest v. Catalina Foothills School District, 61 U.S.L.W. 4641 (June 18, 1993) 7, 10, 20, 25
Zorach v. Clausen, 343 U.S. 306 (1952) 26

Constitutional and Statutory Provisions

U.S. CONST. amend. I, cl. 1 ..... i, *passim*
U.S. CONST. amend. I, cl. 2 ..... i, *passim*
42 U.S.C. § 300z 24
47 U.S.C. § 326 27
P.L. 102-385 (Oct. 5, 1992) ..... i, *passim*
§ 2 ..... 3, *passim*
§ 4 ..... i, *passim*
§ 5 ..... i, *passim*
Supreme Court Rule 18.6 1

Other Authorities

"The Philanthropy 400," V CHRONICLE OF PHILANTHROPY No. 2 (Nov. 3, 1992) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-45

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the
VISION INTERFAITH SATELLITE NETWORK, *et al.*,
Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the District of Columbia

---

JOINT MOTION TO AFFIRM

MOTION TO AFFIRM

Appellees hereby move this Court pursuant to Rule 18.6 of the Rules of the Supreme Court to affirm the judgment of the three judge court of the United States District Court for the District of Columbia. As set forth within, the questions, regarding the Religion Clauses of the United States Constitution, upon which the resolution of this matter depend are so well-settled in the precedents of this Court as to require no further development.

STATEMENT OF THE CASE

Fact Summary

Appellee Broadcasters are all nonprofit tax-exempt public charities which operate in the aggregate 22 television stations on commercial frequencies. These broadcasters provide primarily family oriented, inspirational, religious and nonviolent programming. Their religious programming is varied and diversified, includes virtually every Protestant denomination, Catholic and Messianic Jewish programs, as well as public affairs, news, and informational programs. Programming for children sixteen years of age and younger is also provided on a regular and sustaining basis.[1] By order dated April 8, 1993, the district court granted the Motion by these Appellees to intervene as Defendants. *Turner Broadcasting System Inc. v. Federal Communications Commission*, 819 F. Supp. 32, 36 n.1 (D.D.C. 1993), Appendix to Joint Jurisdictional Statement at C-3.[2]

As with the program offerings of the primary commercial networks (ABC, NBC, CBS and FOX), Appellee Broadcasters are subject to considerable market competition. For example, Appellants National Interfaith Cable Coalition, Inc., d/b/a Vision Interfaith Satellite Network ("VISN"), provides a religious and inspirational program service distributed by satellite. VISN was started at the urging of, and has been sustained by loans from, the largest multiple system cable owner and operator in the country, TeleCommunications, Inc. ("TCI"). *Cf.* 819 F. Supp. at 48, J.J.S. App. at C-26-27.

---

[1] Trinity Broadcasting Network ("TBN") is the 97th largest public charity in the United States. *See* "The Philanthropy 400," V CHRONICLE OF PHILANTHROPY at 1 (Nov. 1992). The February 1993 Arbitron Company Report listed TBN as the most viewed religious network in the country.

[2] Hereinafter the Appendix to the Joint Jurisdictional Statement, filed by VISN and AIB, is referred to as: "J.J.S. App."

Prior to enactment of the Cable Act, cable systems had an incentive to exclude local television stations because they competed with those television stations for advertisers, programming and viewers. P.L. 102-385 § 2(a)(16) ("There is an economic incentive for cable systems to terminate the retrainsmission of the broadcast signal"). The Cable Act was enacted by Congress to correct that market imbalance, and to promote the widest possible diversity of views and information to viewers. P.L. 102-385 §§ 2(a)(6), (14), (15) & (16).

Among Congress' purposes in adopting the Cable Act was the goal of insuring continued access for subscribers to their local television stations. P.L. 102-385 § 2(a)(16). Local television stations provide unique local programming, much of which is required by the rules and regulations of the Federal Communications Commission to be responsive to ascertained community needs, problems and interests. As Congress found in section 2(a)(9) of the Cable Act, "having cable systems carry the signals of local commercial stations [is necessary and] serves the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient and equitable distribution of broadcast services."

Through the use of neutral criteria, the Cable Act neutrally provides cable subscribers access to all licensed local full power television stations. As shown by its stated purpose, legislative history, and implementation, the Cable Act was not intended to bestow, and does not function as, a unique and special boon to religious broadcasters, or any other type of broadcaster, by virtue of the content of the programming they may provide.[3] That

---

[3] Joint Appellant with VISN, Atlanta Interfaith Broadcasters, Inc., admitted in its February 19, 1993 Reply Memorandum at 7 in the proceeding below (Civil Action No. 92-2247) that neither the Cable Act nor its legislative history make any mention of bestowing any special benefit on any television station because of its program content.

certain cable programmers, such as VISN, have failed to avail themselves of the opportunity to seek and obtain broadcast licenses for local television stations does not mean those provisions abridge the Religion Clauses. Rather, it simply reflects the outcome of private decisions, not a statutory imperative. The Cable Act, as held by the court below, survives constitutional review and should be upheld.

The Decision Below

Unlike others challenging the "must carry" provisions of the Cable Act, VISN and AIB alleged in the district court below that §§ 4 and 5 of the Act violate the Establishment Clause and the Free Exercise of Religion Clause. The district court squarely addressed and rejected the claims asserted by VISN and AIB under the Religion Clauses. *Turner Broadcasting System Inc.*, 819 F. Supp. at 48-49, J.J.S. at C-26-29. In so doing, the district court applied, and correctly relied on, constitutional precedents of this Court.

In essence, VISN and AIB argued below that, since must carry provisions "will reduce the number of cable television channel positions available for use by non-broadcast programmers," such as themselves, the "must carry" rules will result in the exclusion of VISN and AIB from cable systems where they might otherwise be presented. VISN and AIB asserted, "cable operators forced to carry some broadcast religious programming will resist voluntary carriage of additional religious fare" such as VISN and AIB provide. 819 F. Supp. at 48, J.J.S. App. at C-27.

As the district court understood the claims under the Religion Clauses, "[VISN and AIB] argue[] that the must-carry provisions, by granting preferential treatment to local religious broadcasters, create an illicit liaison between the federal government and particular sectarian interests in violation of the Establishment Clause, and by impeding [VISN and AIB] from reaching [their] audience

and delivering [their] religious message, the provisions violate the Free Exercise Clause." *Id.*

Treating the Establishment Clause claim first, the district court invoked the familiar test for alleged violations;

> To comport with the Constitution under the now familiar Establishment Clause test, government action must "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.' '

Id. (quoting *Lee v. Weisman,* 112 S. Ct. 2649, 2654 (1992)) (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973)). The district court proceeded to analyze VISN's and AIB's Establishment claim in accordance with the *Lemon* Test.

As a preliminary matter, the district noted, and VISN and AIB concede, "[t]here is no evidence that the must-carry provisions were intended to be anything but religion-neutral—as well as content-neutral . . . ." 819 F. Supp. at 48, J.J.S. App. at C-27. Further, the district court found, the "must carry" rules "do not involve the government in religious affairs[nor] will [the rules] be perceived to represent governmental endorsement of particular religious views or religion in general." *Id.*

The district court's application of the *Lemon* Test was straightforward.

First, the court noted that the "must carry" rules "clearly reflect a secular purpose . . . ." *Id.* Regarding evidence of secular purposes of the Cable Act and the "must carry" rules, the court held, "[t]here is nothing in the record to indicate that Congress was even aware of any difference in the religious messages of broadcasters and programmers," and, further, found no evidence "to indicate that must-carry represents a deliberate attempt to favor or disfavor any religious views or practices." *Id.*

Second, the district court found that the "must carry" rules passed the primary effect prong of the *Lemon* Test; that is, that the "must carry" rules had a primary effect that was neither the advancement nor the inhibition of religion. In concluding that there was no impermissible primary effect, the court stated, "[t]he must-carry provisions apply to all broadcasters, without regard to whether their programming contains any religious fare at all." 819 F. Supp. at 49, J.J.S. App. at C-28. Consequently, the district court could not "conclude that the primary effect of the provisions is to advance the religious message of local broadcasters or suppress the religious messages of cable programmers." *Id.*

Third, the district court concluded that the "must carry" rules do not threaten excessive governmental entanglement with religion. "Regulatory legislation creates excessive entanglement," as the district court stated, "only if there is 'detailed monitoring and close administrative contact' between the government and sectarian organizations or affairs." 819 F. Supp. at 49, J.J.S. App. at C-29 (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 696-97 (1989)). Such "detailed monitoring and close administrative contact" simply is not threatened under the "must carry" rules. The court below reasoned that, because "must carry" eligibility flows from routine satisfaction of a licensing scheme which is free from excessive entanglement, there was "no Establishment Clause infirmity." *Id.* (quoting *Hernandez,* 490 U.S. at 697).

Nor did the district court find merit in VISN's and AIB's Free Exercise Clause claim. In reaching its conclusion regarding the Free Exercise Claim, the district court reasoned, "[a]ny burden imposed on [VISN's and AIB's] religious practice, however, is merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." 819 F. Supp. at 49, J.J.S. App. at C-29. Because the "must carry" rules are neutral and generally applicable,

the district court held that they "do not violate the Free Exercise Clause." *Id.* (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)). As a factual matter, the court noted, "the must-carry provisions do not, in any way, foreclose dissemination of any religious message or abridge any religious practice." *Turner Broadcasting System, Inc.*, 819 F. Supp. at 49, J.J.S. App. at C-29.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the three judge district court below. The questions on which the decision of this cause depends are so plainly settled by the prior decisions of the Court as not to need further development. Just at the end of this Court's last Term, and subsequent to the decision of the district court below, this Court rendered decisions in three Religion Clause cases employing the identical rationales to those found in the decision of the district court. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993) (equal access for religious viewpoints in after hours public school forum does not violate the Establishment Clause); *Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993) (funding for interpreter to assist deaf student in religious school provides, at most, a mere incidental benefit); *Church of the Lukumi Babalu Aye v. City of Hialeah, Florida*, 113 S.Ct. 2217 (1993) (ordinances explicitly adopted to prevent religious sacrifices fail scrutiny under the Free Exercise Clause because the laws were neither neutral nor generally applicable). Because the decision of the district court fully comports with the prior decisions of this Court, summary affirmance is appropriate.

The focus of this case is the facial validity of an act of Congress, the Cable Television Consumer Protection and Competition Act of 1992. Fortuitously, in the debates and considerations leading to the adoption of the Cable

Act, Congress expressly stated its purposes in promulgating the Act, and left an ample record supporting its adoption of the Cable Act.[4] Congress declared the goals of the Act to be: promotion of the availability to the public of a diversity of views and information through cable television and other video distribution media; reliance on the marketplace, to the maximum extent feasible, to achieve that availability; ensuring that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; where cable television systems are subject to effective competition, ensuring that consumer interests are protected in receipt of cable service; and, ensuring that cable television operators do not have undue market power vis-a-vis video programmers and consumers. P.L. 102-385 § 2(b), 106 Stat. 1463 (Oct. 5, 1992).

Appellants VISN and AIB challenged the "must carry" provisions of the Cable Act, below, as facially unconstitutional violations of the Religion Clauses of the first amendment. The "must carry" provisions (§§ 4 and 5) of the Cable Act compel local cable system operators to carry the broadcast signals of Federal Communications Commission licensees, without reference to the content of the programming broadcast by such licensees. The district court below correctly concluded that the "must carry" rules do not violate the Religion Clauses.

The "must carry" rules have completely secular legislative purposes, neither advance nor inhibit religion, and do not involve an excessive government entanglement with religion. Accordingly, the "must carry" provisions of the Act are fully compatible with the Religion Clauses of the first amendment.

---

[4] The findings of fact which prompted the legislation are included within the Cable Act. *See* § 2(a), 106 Stat. 1460-63. The purposes to be served by the legislation are also included within the Act. *See* § 2(b), 106 Stat. 1463.

In their *facial* attack on the Cable Act, VISN and AIB asserted that *implementation* of the Act would impermissibly impact the distribution of their programming and would also impermissibly advance the distribution of religious programming carried on television stations licensed by the Federal Communications Commission.

These Establishment and Free Exercise Clause assertions by Appellants fall flat. The Cable Act is facially neutral, and it is designed to increase the diversity of program offerings available to the cable consumer by including the wide diversity of television stations which are licensed to an area.

In addition, the Cable Act's facial neutrality in the areas of religion and religious broadcasting accords with this Court's interpretation of the Establishment Clause in *Lemon*. Instead of proffering concrete examples of the Cable Act's constitutional invalidity, VISN and AIB have retreated into comparative evaluations of competing broadcasters' program content. *See* Joint Jurisdictional Statement at 11-13. Such content-based determinations are contrary to this Court's holding in *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1982) (programming formats and content are not part of the licensing procedures).

In the district court, VISN and AIB acknowledged the constitutionality of the Federal Communications Commission licensing of religious organizations which provide religious broadcasting services.[5] The Appellants objected below, as here, only to cable-based, secondary distribution of such religious television service where the "must carry" rules affect access to cable systems. Appellants' approach, however, overlooks the intent of Congress in enacting

---

[5] Lower courts have upheld the licensing of groups providing religious programming since 1958. *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959); *The King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974) (and cases cited therein).

the Cable Act: to increase the cable consumer's access to diverse programming by requiring cable companies to carry local television stations licensed by the Federal Communications Commission, without regard to the program content or the format of any station.

ARGUMENT

I. THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

On occasion, most recently in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), this Court has employed a three-prong test to assess alleged violations of the Establishment Clause. *Harris v. McRae*, 448 U.S. 297 (1980) (explaining *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).[6] As stated in *Harris*:

> It is well settled that a legislative enactment does not contravene the Establishment Clause if it has[: 1] a secular legislative purpose[; 2] if its principal or primary effect neither advances nor inhibits religion [and, 3] if it does not foster an excessive government entanglement with religion.

448 U.S. at 319. *Accord, Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

In *Lamb's Chapel*, this Court held that affording equal access for expression of religious viewpoints does not violate the Establishment Clause, when analyzed under the framework of the *Lemon* test. *Lamb's Chapel*, 113 S.Ct. at 2148. In this case, the district court merely applied

---

[6] This Court has not been slavishly devoted, however, to the *Lemon* Test. In *Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993), this Court addressed a threatened Establishment Clause violation without applying the *Lemon* test.

long-standing constitutional principles derived from the settled precedent of this Court and correctly concluded that the "must carry" rules survive scrutiny under the *Lemon* test. The primary purpose of the Cable Act, promoting consumer protection and industry-wide competition, is secular. Likewise, the primary effect of the Cable Act is secular; the Act neither advances nor inhibits religion. Rather than excessive entanglement, the Cable Act is simply neutral legislation on an important economic issue.

A. The Predominant Purpose Of The Cable Act Is To Encourage Competition And Thereby Benefit The Consumer.

The Cable Act was enacted, as the district court noted, solely to serve secular purposes. *Turner Broadcasting System Inc.*, 819 F. Supp. at 48, J.J.S. App. at C-28. Thus, the Act survives scrutiny under the first prong of the *Lemon* test. *Cf. Harris*, 448 U.S. at 319 (purpose of governmental action must be secular, not religious).

Congress declared its purposes in enacting the Cable Act to be: promotion of programming diversity (utilizing marketplace forces to the extent feasible); ensuring expanded cable capacity and expanded programming; promotion of consumers' interests where effective competition is absent; and, prevention of the exercise of undue market power by cable operators over consumers or video programmers. P.L. 102-385 § 2(b), 106 Stat. 1463 (Oct. 5, 1992). Plainly, these purposes are secular, not "religious" or sectarian.

Moreover, the district court correctly noted that the voluminous legislative history of the Cable Act is devoid of considerations of how to benefit or improve the market position or marketability of religious broadcasters. 819 F. Supp. at 48, J.J.S. App. at C-28. The words "reli-

gion," "religious," and "religious broadcasting" do not even appear in the Act or in the underlying legislative history. Clearly, the impact which VISN and AIB argue that the "must carry" rules of the Cable Act will have on religious broadcasting was not intended by Congress. The envisioned beneficial impact of the Cable Act on religious broadcasters was never conspicuously considered by Congress. The adoption of the Cable Act was not catalyzed by any sort of religious consideration. Accordingly, the Cable Act passes muster under the first prong of *Lemon*.

Not only is the Act devoid of sectarian purpose, it cannot be doubted that such governmental regulation of video programming distribution, to promote economic and free speech goals, serves a secular purpose. Insuring that covered cable systems provide a wide diversity of cable services primarily serves the secular purposes enumerated in the Cable Act. Since *Lemon*'s secular legislative purpose requirement is violated *only* when the governmental activity is *motivated wholly by religious considerations*, the Cable Act satisfies the secular purpose prong of *Lemon*. As this Court held in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1985):

> [We have] invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it was concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial . . . we saw a secular purpose and no conflict with the Establishment Clause.

465 U.S. at 680 (emphasis added). In *Lynch*, this Court expressed its "reluctance to attribute unconstitutional motives . . . ., particularly when *a plausible secular purpose*" appears on "the face of the statute." *Id.* (emphasis added). For the Cable Act, however, there are not only plausible secular purposes, the secular purposes are the

only benefits to which the Act and its legislative history refer.

Thus, the primary purpose of the Cable Act—providing a competitive diversity of programming—fulfills the *Lemon* requirement of a secular legislative purpose. Any incidental benefit that may flow to religious broadcasters under the Act does not invalidate the Act's plainly secular purpose. This Court must look at Congress' expressed purposes, not a litigant's interpretation of that purpose or at the incidental benefits that may flow from the legislation.

B. The Primary Effect Of The "Must Carry" Rules Of The Cable Act Is To Promote Competitive And Diverse Cable Programming.

The second prong of the *Lemon* Test inquires whether the legislation at issue has the principal or primary effect of advancing or inhibiting religion. *Cf. Harris,* 448 U.S. at 319. As the district court correctly reasoned, "[a] law does not violate the Establishment Clause merely because it benefits or burdens religious institutions in some way." 819 F. Supp. at 49, J.J.S. App. at C-28 (citations omitted). The primary effect of Section 4 of the Cable Act is to improve access to the programming of local broadcast stations for cable consumers. Certainly, the advancement, or the inhibition, of religion is neither a primary nor even a tertiary effect of the Act. The fact that a small number of local stations within that class principally carry religious programming does not alter the results of these considerations.

One reason that the Court may be confident that any asserted advancement of religious broadcasting will be only an incidental effect is that, as noted in Argument I(A), *supra,* neither the Cable Act nor its legislative history mention religious broadcasting. Another reason is that neither Congress nor the Federal Communications Commission know *which* local television stations are

broadcasting predominantly religious programming or, in fact, how many such stations exist. The Federal Communications Commission does not require applicants for construction permits (FCC Form 301) or for licenses (FCC Form 302) to provide information concerning proposed programming formats. This Court has affirmed the policy decision of the Federal Communications Commission to treat changes in entertainment programming as an immaterial consideration. *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Simply stated, because of the studied ignorance of programming content of its licensed commercial broadcasters, the Federal Communications Commission is incapable of favoring, or disfavoring, one program format over another.

Further, there is, without dispute, a broad spectrum of program formats among the licensed local broadcast stations which will have the benefit of the "must carry" rules. Because of the wide diversity of programming formats, and the predominance of secular content amongst those licensees, there is little or no danger of endorsement or preference. In *Board of Education v. Mergens*, 496 U.S. 226, 252 (1990), this Court upheld a statute addressing equal access rights of high school students against a challenge under the Establishment Clause. There, a plurality of this Court noted, "the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, counteract any possible message of official endorsement of or preference for religion or a particular religious belief." *Id.*

A municipality does not impermissibly advance religion by permitting the parish church to connect into the city water and sewage system. Nor does a utility monopoly, operated under close government regulation, impermissibly advance religion by permitting a synagogue to participate in the local telephone service. And in similar fash-

ion, a policy allowing licensed local stations that carry religious formats to have access, on a basis equal to that afforded all other licensed local stations, to cable systems regulated under monopolistic conditions does not impermissibly advance religion.

This Court's decisions regarding analogous governmental activities lend support to the constitutionality of "must carry" rules which incidentally benefit religious broadcasters. Those decisions were summarized in *Lynch v. Donnelly*, 465 U.S. 668, 681-82 (1985):

> [T]o conclude that the *primary effect* of including the creche is to advance religion . . . would require that we view it as more beneficial to and more an endorsement of religion . . . than[:] expenditure of . . . money for textbooks . . . to students attending church-sponsored schools[;] expenditure of public funds for transportation . . . to church-sponsored schools[;] federal grants for college buildings of church-sponsored institutions of higher education[;] noncategorical grants to church-sponsored properties[;] Sunday Closing Laws [previously] upheld; released time program[s] for religious training; and, the legislative prayers [also previously] upheld.

465 U.S. at 681-82 (citations omitted).

Federal legislation providing cable subscribers improved access to local broadcast stations threatens even less directly those secondary effects described in *Lynch*. Indeed, this Court has affirmed other similar policies of equal access. *See Mergens*, 496 U.S. 296 (equal access to secondary school student club forum); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986) (equal use of state benefits for religious higher education); *Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access to public university facilities for religious student groups); *Jones v. Wolf*, 443 U.S. 595 (1979) (judicial resolution of church property disputes through neutral principles of adjudication).

An absolute separation between government benefit and religious organizations, under the rubric of separation between church and state, has never been considered by this Court to be required under the Establishment Clause. As noted in *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976), "a hermetic separation of the two is an impossibility . . . [that] has never been required." *Cf. Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution . . . . [A]t graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices and religious persons will have some interaction with the public schools and their students").

Even in the most extreme *imagined* case, all that the Cable Act provides is an *incidental* government benefit to religious broadcasters through a neutral law of general applicability affecting the cable and broadcast television industries. As noted in Argument II, *infra*, such incidental benefits do not violate the Establishment Clause. Thus, the Cable Act simply does not have the primary effect of endorsing religion.

C. No Excessive Entanglement Results From Providing "Must Carry" Access To Broadcasters Providing Religious Programming.

The "must carry" rules of the Cable Act do not foster excessive entanglement of government in religion. According "must carry" status to local broadcast stations with religious programming involves no government entanglement in religion. The "must carry" duty is an index of the status, previously determined, of the local religious broadcaster, as a licensee of the Federal Communications Commission. Thus, the only government act resulting in "must carry" status is the decision to grant a license to a broadcaster who ultimately chooses a religious programming format. The programming decisions which result in

a station carrying a religious format are considered irrelevant for regulatory and legal purposes, *see WNCN Listeners Guild*, 450 U.S. 582. As this Court noted, affirming the Federal Communications Commission's policy on the immateriality of programming content to licensing issues, the Federal Communications Commission treats content as an immaterial consideration. 450 U.S. at 585-86. It is the *deliberate exclusion* of religious broadcasters from among licensed local stations entitled to enjoy the benefits of the "must carry" rules, not their incidental inclusion, that "would risk greater entanglement by attempting to enforce its exclusion of . . . religious speech." *Widmar*, 454 U.S. at 272 n.11.

The monumental task of accomplishing the exclusion of religious broadcasting would require Congress or the Federal Communications Commission to engage in continuous and invasive monitoring of the daily program offerings of its licensees. Furthermore, because most television licensees broadcast some religious programming, unprincipled and unconstitutional determinations would have to be made. For example, quantitatively, how much religious programming is too much? Or, what kinds of speech make a licensee a "religious" broadcaster?

A policy of exclusion would thrust the Federal Communications Commission into a regulatory morass with profound constitutional consequences, but such a policy would not inform regulatory decision-makers of the answers to questions such as whether a program advancing overtly religious principles and precepts (but without proselytization) is religious? Or, whether allowing guests on a talk show to share religious experiences changes the program from a secular designation to a sectarian one. Clearly, the quickest way to entangle Congress and the Federal Communications Commission in a nettlesome thicket of Establishment Clause litigation is to *exclude* religious broadcasters from the class of local broadcast stations to which cable subscribers will have access under

the "must carry" rules. *Cf. Mergens,* 110 L.Ed.2d at 214 (plurality) ("if a state refused to let religious groups use . . . facilities open to others, then it would demonstrate not neutrality but hostility toward religion . . . . The Establishment Clause does not license government to treat religious and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities") (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)).

Interplay between government and religion under the Cable Act is practically nonexistent. This fact stands in clear distinction to the significant levels of interplay between government and religion in those secular programs already reviewed and upheld by this Court. *See, e.g., Board of Education v. Allen,* 392 U.S. 236, 244-45 (1968) (upholding state textbook loans to religious school students); *Mueller v. Allen,* 463 U.S. 388, 403 (1983) (sustaining state tax deductions and audits for religious school textbooks if secular texts); *Marsh v. Chambers,* 463 U.S. 783, 795 (1983) (affirming constitutionality of the provision of paid chaplain for state legislative assembly). A fortiori, the lesser involvement here, a simple mandate giving cable subscribers improved access to all local stations, including those carrying religious programming, does not create an excessive entanglement problem. Moreover, a "real threat" of excessive entanglement is insufficient; mere imagined possibilities neither violate the constitution nor confer standing.

Nor has this Court previously considered religious institutions as automatically disabled by the Establishment Clause from receiving government benefits. Further, simply being one religious recipient among many secular recipients does not constitute a threat of excessive entanglement. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all."

Roemer, 426 U.S. at 746.[7] In fact, this Court has upheld against a facial challenge "a statute that provides . . . benefits" "in a neutral fashion to religious and nonreligious applicants alike," as well as the constitutionality of a specific benefit against an "as applied" challenge based solely on "the religious character of a specific recipient." *Bowen v. Kendrick*, 487 U.S. 589, 551 (1988) (Kennedy, J., concurring).

This Court has said it is "not prepared to read into [a challenged statutory] plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980). This Court must presume, absent evidence to the contrary, that the Cable Act will be presumed to function as a neutral platform for program diversity and economic competition, rather than assuming, as do Appellants, that the "must carry" rules will serve presumptively as a platform for religious indoctrination.[8]

II. THE CABLE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT REGULATES A BROAD RANGE OF SECULAR CABLE ACTIVITY, WHICH MAY INCIDENTALLY BENEFIT RELIGIOUS BROADCASTERS.

Historically, this Court has not found fault with facially neutral laws that benefit a broad spectrum of secular groups, even though benefits flow incidentally to religious

---

[7] *See also Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (providing construction grants to "all colleges and universities regardless of any affiliation with or sponsorship with a religious body"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (approving certain benefits "available to all institutions of South Carolina, whether or not having a religious affiliation").

[8] *E.g., Allen*, 392 U.S. at 245 ("this court has long recognized that religious schools pursue two goals, religious instructions and secular education.")

organizations. Accordingly, the proper constitutional focus here is on the class of beneficiaries of the "must carry" rules on the face of the Cable Act. Appellants err in focusing on one particular subclass, religious broadcasters, of a larger class receiving benefits under the Cable Act: commercial broadcast licensees. The court below, however, properly analyzed the benefits, if any, to licensed local broadcasters who carry religious programming, concluded that such benefits are only incidental, and, declared the "must carry" rules constitutional. The eminent reasonability of the lower court's decision flows from its conscious compliance with this Court's decisions regarding "incidental benefits to religion." *See Zobrest v. Catalina Foothills School District*, 61 U.S.L.W. 4641 (June 18, 1993); *Mergens*, 496 U.S. 226; *Bowen*, 487 U.S. 589; *Witters*, 474 U.S. 481; *Mueller*, 463 U.S. 388; *Widmar*, 454 U.S. 264; *Nyquist*, 413 U.S. 756.

In the series of cases running from *Nyquist* to *Zobrest*, this Court has held that programs providing governmental benefits by use of neutral criteria do not violate the Establishment Clause just because religious groups share in the benefits. The only benefits to religion because of the Cable Act are incidental. The Cable Act comports with this Court's jurisprudential considerations and is constitutional.

For example, in *Bowen*, this Court said:

> We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609. And, in *Widmar*, 454 U.S. at 274, this Court said:

> But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement of religion."

Again, in *Nyquist*, 413 U.S. at 771, this Court said:

> [N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religion is, for that reason alone, constitutionally invalid.

An "incidental benefit to religion" occurs when a benefit flows from a neutral government program to a broad array of groups, including religious groups. Such incidental benefits are constitutional. In such instances, religious beneficiaries are only one group among many different recipients, and the qualifying criteria for receiving benefits has nothing to do with religion. Here, the only criterion for receiving the benefit is a neutral one—the recipient must be a licensee of a local television station.

This "incidental benefit" standard reflects this Court's rulings in other recent cases concerning financial aid to religious groups or persons. *See Mueller,* 463 U.S. 388; *Witters,* 474 U.S. 481; *Bowen,* 487 U.S. 589.[9]

In *Mueller,* the first case of that trilogy, this Court held that providing benefits which are available to a wide variety of groups, including religious groups, does not violate the Establishment Clause. This Court pointed to the important analogous legal principle fo equal access from the speech-open forum area of First Amendment law:

---

[9] This Court has also upheld laws that gave money to religious organizations when the government gave money to secular organizaitons for the same purposes. *See, e.g., Regan,* 444 U.S. 646 (statutory scheme reimbursing parochial schools for state-required testing and reporting is constitutional); *Wolman v. Walter,* 433 U.S. 229 (1977) (statute that provided secular textbooks, standardized testing, diagnostic services and remedial services to parochial school students is constitutional); *Hunt,* 413 U.S. 734 (revenue bond scheme to fund construction of buildings at a Baptist college is constitutional); *Tilton,* 403 U.S. 672 (federal program that funds construction of nonreligious buildings at religious colleges is constitutional); *Walz v. Tax Commission,* 397 U.S. 664 (1970) (tax exemptions available to all charitable nonprofit groups does not violate the Establishment Clause because religious groups are included in that class).

> Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of non-religious as well as religious speakers" does not "confer any imprimatur of state approval," ibid, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." Ibid.

463 U.S. at 397.

The Minnesota tax deduction upheld in *Mueller* gives the model of a constitutional program which incidentally benefits religion, and the Cable Act is analogous to that tax deduction. Minnesota demonstrated a secular purpose for the tax deduction—helping all parents to defray the expenses of educating their children. 463 U.S. at 395. Minnesota granted a state income tax deduction for expenses incurred by parents sending their children to any school, public, private or parochial. *Id.* The tax deduction was not limited to private or parochial schools only. 463 U.S. at 398. The tuition tax deduction was only one among many tax deductions available to Minnesota taxpayers. 463 U.S. at 396.

In this case, the Cable Act provides a benefit to a broad class of recipients—licensed local broadcast stations guaranteed access to cable subscribers served by *inter alia* a monopoly.[10] Here, the *Mueller* principle (that neutral government legislation benefitting a broad range of recipients does not violate the Establishment Clause just because some recipients are religious) affirms the constitutionality of the Cable Act. "Must-carry" rules improve access to private religious broadcasters only because they

---

[10] Congress specifically found that the Act was necessary to prevent monopolistic activity by cable systems. *See* P.L. 102-385, §§ 2(a)(9-19).

are a small subclass of a larger class chosen without regard to religious principles or tenets. In disputes such as this one, the benefits program is constitutional because religious groups receive only incidental benefits. This is the clear teaching of *Mueller*.

Upholding the "must carry" provisions is also warranted because only a very small percentage of licensed full power commercial television stations broadcast predominantly religious formats.[11] If some statistically significant portion of "must carry" beneficiaries broadcasted predominantly religious formats, a factual issue regarding a de facto material benefit could, arguably, exist. In the case before this Court, however, the evidence in the record below demonstrates that "must carry" offers only incidental benefits, if any, to religion.

The facts of this case parallel the facts found in *Witters*. In *Witters*, Larry Witters qualified for a Washington state program that provided college aid for blind people who attended college. The state refused to give money to Mr. Witters to attend a Bible college where he wanted to study to be a pastor or youth leader. This Court reversed and ruled that the Establishment Clause did not prevent Larry Witters from receiving funding. This Court found (as in *Mueller*) that the college aid program had a secular purpose of aiding blind people in their educational pursuits, 474 U.S. at 495. Also, religious colleges were only one among many different aid receipients of the program. 474 U.S. at 488.

To illustrate the constitutionality of "incidental benefits" to religion, this Court has explained that not every occasion in which government funds reach religious recipients raises Establishment Clause concerns:

---

[11] The Barna Research Group, in a survey conducted in February 1993, concluded that only six and a half (6.5) percent of the licensed commercial television stations in the United States are predominantly programmed with religious material. *See* Affidavit of Robert Higley at Addendum 4a-5a, 7a.

> It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

Witters, 474 U.S. at 486-87. To conclude that tertiary or quaternary effects can be accounted as violations of the Establishment Clause requires a mind trained with an eye blinded to the history, the text and the purposes of the Religion Clauses. This Court has noted that such a myopic approach to the issue of incidental benefits to religion would result in invalidation of *all* activities even remotely related to religion, because "[f]ocus exclusively on the *religious component* of *any activity* would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680 (emphasis added). Logic dictates that the lesser incidental benefit to religious organizations here, equal access together with all other licensed local stations to cable subscribers (as opposed to an actual monetary subsidy), also does not violate the Establishment Clause.

This Court reached essentially the same conclusion regarding actual funding of grantees under the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.*, (AFLA) in the *Bowen* case. In *Bowen*, the federal government funded programs to discourage teenage sexual activity outside of marirage. Included among the grant recipients were some religious groups. This Court ruled that AFLA was facially constitutional, even though religious groups received some grants. Because AFLA neutrally provided grants to a broad range of groups, the fact that incidental benefits to those religious groups participating in the plan did not lead to the conclusion that AFLA violated the Establishment Clause.

Just last Term, in *Zobrest*, this Court again affirmed the constitutionality of a policy affording "incidental benefits" to a religious school. In *Zobrest*, this Court noted that the Establishment Clause does not bar "religious groups from receiving general governmental benefits." As this Court stated:

> a contrary rule would lead to such absurd results . . . . [Thus,] we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id.

Through *Mueller*, *Witters*, *Bowen*, and *Zobrest*, a fundamental principle can be discerned: when the government legislates generally in furtherance of a secular governmental purpose, and neutrally benefits various groups, incidentally inclulding some religious groups, such legislation does not violate the Establishment Clause. Thus, the axiom that "religious institutions need not be quarantined from public benefits that are neutrally available to all," *Roemer*, 426 U.S. at 746, is applicable in the instant case.

The Cable Act neutrally provides cable subscribers access to licensed local broadcast stations. As demonstrated by its stated purposes and legislative history, both of which are utterly silent about religion, the Cable Act was not intended by Congress to be, nor will it ultimately become, a special boon to religious broadcasters.

This Court's holdings in *Mueller*, *Witters*, *Bowen*, and *Zobrest* are all unmistakable and here applicable: if legislation has a secular purpose and provides benefits neutrally available to all who may participate, then it is constitutional, even if it benefits religious groups or individuals. Because the Cable Act is facially neutral and only incidentally benefits religious broadcasters, it does not violate the Establishment Clause.

III. EXCLUDING RELIGIOUS BROADCASTERS FROM A FACIALLY NEUTRAL CLASS RECEIVING A GOVERNMENT BENEFIT WOULD DEMONSTRATE A HOSTILITY TO RELIGION PROHIBITED BY THE FIRST AMENDMENT.

Appellants urged the district court to strike the "must carry" provisions of the Cable Act *because* religious broadcasters may be among those local commercial television broadcasters who gain access to new, previously inaccessible, channels. Appellants argue from a perception of the Religion Clauses that demonstrates an unseemly lack of knowledge of the Religion Clauses and their purposes, and this Court's decisions elucidating both. According to the Appellants, the Establishment Clause compels governments to demonstrate hostility, not neutrality, to religion to avoid violating the Establishment Clause.[12] Under the United States Constitution, however, impermissible hostility toward religious expression is presented in circumstances where all other types of speech are accorded "must carry" status by the Cable Act but religious broadcasters are excluded.

Again, in *Mergens*, 496 U.S. 226, this Court arrived at the same conclusion: the purposeful exclusion of religious

---

[12] This hostility requirement flows from a construction of the Establishment Clause which this Court has never adopted. As this Court observed in *Zorach v. Clausen*, 343 U.S. 306 (1952):

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. *To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.* That would be preferring those who believe in no religion over those who do believe.

Id., 343 U.S. at 313-14 (emphasis added). In the instant case, there is not even, as in *Zorach*, a goal of encouraging religious activity. The district court below found that there was "no evidence that the must-carry provisions were intended to be anything but religion—as well as content-neutral . . . ." 819 F. Supp. at 48, J.J.S. App. at C-27.

speech shows hostility to religion and violates the Establishment Clause. Twice in *Mergens* this Court made the point:

> Indeed, the message is one of neutrality rather than endorsement; if a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248.

> Indeed, as the Court noted in *Widmar*, a denial of equal access to religious speech might create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Mergens, 496 U.S. at 253-54 (citations omitted).

Moreover, as noted in Argument I(C), *supra*, a policy of singling out religious speech for exclusion causes excessive government entanglement in religious matters in violation of the Establishment Clause. Under that approach, governments need to monitor closely *all* speech to find the perhaps infrequent, but always prohibited, religious speech. Furthermore, successful exclusion of religious programming requires governmental censors to make value judgments about important constitutional issues (such as what constitutes religious speech).[13] Rather than exhibiting such hostility, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327, 334 (1987). In the present case, the principle of benevolent neutrality means that cable subscribers should be given access to *all* licensed local television stations regardless of the station's

---

[13] Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, prohibits government censorship and states: "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

programming choices. The Establishment Clause requires such an outcome.

Moreover, the Cable Act displays no preference for one religious group over another, or for religion in general. VISN is not excluded from *any benefit* attributed to the Cable Act by virtue of VISN's religious beliefs. VISN is excluded, if at all, only because of its indolence in the matter of licensing. VISN has not sought to acquire a local television station license, which would make it eligible for the benefits of the "must carry" provisions of the Cable Act, nor has it sought to exhibit its programming on local television stations.

IV. NO FREE EXERCISE OF RELIGION ISSUE IS PRESENTED BY THE "MUST CARRY" RULES OF THE CABLE ACT.

The district court correctly concluded, 819 F. Supp. at 49, J.J.S. App. at C-29, that the Cable Act is a neutral law of general applicability and does not violate the Free Exercise Clause.

VISN asserts that the district court erred in its conclusion that the "must carry" provisions comport with VISN's rights under the Free Exercise Clause. When government does not directly target a religious practice for restriction or prohibition, but, instead formulates a neutral law of general applicability, the incidental impact of such restriction or prohibition on a religious practice does not work a cognizable injury to interests protected by the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872, 879 (190). As this Court in *Smith* stated:

> Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes).'

Smith, 494 U.S. at 879; *see also Church of the Lukumi Babalu Aye*, 113 S.Ct. 2217.

Here, Congress has not directly targeted a religious practice. Neither commercial television broadcasting nor cable programming are inherently religious in nature. As noted *supra*, Argument I(A), the purposes of Congress in adopting the Cable Act were entirely secular, and the considerations impelling congressional action were also entirely secular. Notably absent from the Cable Act, as well as the underlying legislative history, is any mention of religion.

Plainly, the Cable Act is a neutral law regarding religion. No inquiry is made into religion in the Act, or as a consequence of the Act. Furthermore, the Cable Act is generally applicable. Under the "must carry" provisions, all qualifying cable systems must comply with requirements of the Cable Act. *See* P.L. 102-385 §§ 4 and 5. VISN has not been declared ineligible for any benefits under the Cable Act. VISN is not disqualified from obtaining the license for a local television station, nor is VISN prohibited from seeking to exhibit its programming on licensed local television stations. Any detriment which VISN suffers results from its private decisions concerning program distribution. Those private decisions have no constitutional protection here since VISN is not disqualified in any way from obtaining the benefits VISN claims the Cable Act offers others. Thus, the Cable Act survives a Free Exercise Clause challenge because it is a neutral law of general applicability.

Further, VISN attempts to draw a correlation between this case and *Wooley v. Maynard*, 430 U.S. 705 (1977). This asserted correlation is nonsensical. *Wooley* involved the issue of whether a state may compel one of its citizens to subscribe to a particular ideological belief by promotion of that belief to the exclusion of all others. The "must carry" provisions require only that private cable operators offer their cable subscribers access to a wide variety of local broadcast stations, none of which is singled out for carriage based on the content of its pro-

gramming. VISN's *Wooley* argument boils down to this: the Cable Act's "must carry" provisions allow access to religious broadcasters and, therefore, a compelled association exists. Appellants efforts to pull the *Wooley* decision over the Court's eyes cannot be countenanced. The district court ruled correctly in its dismissal of VISN's Free Exercise Clause claim.

CONCLUSION

The decision of the three judge district court below rests on well-established precedents of this Court and fully comports with the Religion Clauses. Because the questions key to the resolution of Appellants' cause are so plainly settled by this Court's prior decisions as to need no further development, the judgment of the three judge district court should be affirmed summarily.

Respectfully submitted,

COLBY M. MAY
JOSEPH E. DUNNE III
MAY & DUNNE, CHARTERED
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 298-6345

STUART J. ROTH
CHRISTIAN ADVOCATES SERVING EVANGELISM
120 Zeigler Circle E.
Mobile, AL 36608
(205) 633-2154

JAY ALAN SEKULOW
Counsel of Record
THOMAS PATRICK MONAGHAN
JAMES MATTHEW HENDERSON, SR.
MARK N. TROOBNICK
J. DAVID ETHERIEDGE
JOEL H. THORNTON
CHRISTIAN ADVOCATES SERVING EVANGELISM
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Appellees Trinity Christian Center of Santa Ana, Inc. (d/b/a Trinity Broadcasting Network), Tri-State Christian TV, Inc., National Minority TV, Inc. and, All American TV, Inc.

Dated: 4 August, 1993.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Plaintiffs,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2292

DANIELS CABLEVISION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 92-2494

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2495

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 92-2558

DISCOVERY COMMUNICATIONS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

It is, this 1st day of March, 1993,

ORDERED, *nunc pro tunc*, that the Motion for Summary Judgment on Cross-Claim of intervenor-applicant defendant Local Community Broadcasters shall be filed on or before January 22, 1993; and it is

FURTHER ORDERED, that all pending motions for leave to file memoranda in excess of the page limitations established by Local Rule 108(e) (D.D.C.), are granted; and it is,

FURTHER ORDERED, that all pending motions for leave to file out of time are granted.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247 (SFW, TPJ, SS)

TURNER BROADCASTING SYSTEM, INC.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,
Defendants,

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC., d/b/a TRINITY BROADCASTNG NETWORK, ALL AMERICAN TV, INC., TRI-STATE CHRISTIAN TV, INC., NATIONAL MINORITY TV, INC.,
Applicants for Intervention as Defendants.

And Consolidated Actions
Civil Action Nos. 92-2292, 92-2494, 92-2495, 92-2558

AFFIDAVIT OF ROBERT HIGLEY, STATION MANAGER OF WCLJ-TV, BLOOMINGTON, INDIANA

1. I am the station manager of WCLJ-TV, Channel 42, Bloomington, Indiana. WCLJ-TV is licensed by the Federal Communications Commission (FCC) to Trinity Broadcasting of Indiana, Inc., and is a program affiliate of the Trinity Broadcasting Network. I am also in charge of the distribution of TBN's programming by satellite to cable television systems throughout the United States.

2. The programming schedule of TBN, including the feed provided to free over-the-air television stations and to cable television systems throughout the country, is varied and diversified. TBN presents a variety of programs, including religious and inspirational programs, public affairs and informational programs, children's programs and entertainment programs. Among the religious programs offered are a wide variety of Protestant and Evangelical denominations, as well as Catholic, Seventh-Day Adventist, and Messianic Jewish programs. The Protestant denominations which are represented include Baptists, Presbyterians, Lutherans, Assemblies of God, Episcopalian, Methodists, Pentecostal Holiness, and Church of God, among others.

3. WCLJ-TV and TBN comply with the requirements of the FCC in their program offerings. WCLJ-TV has recently been issued a new 5 year renewal of its license by the FCC, authorizing operation into 1997.

4. I am also familiar with the program offering of VISN Interfaith, Inc. VISN provides some, but not all of the denominations offered by TBN. Similarly, TBN has several denominations which are not provided by VISN. I believe both TBN and VISN present a mixed, varied and diversified program offering. Both TBN and VISN are religious organizations.

5. I am also familiar with the Barna Research Group which provided a statement on February 11, 1993, which was included as an attachment to the February 12, 1993 *Memorandum of Points and Authorities of Specialty Broadcasters Supporting the Constitutionality of "Must Carry" Provisions of the Cable Television Consumer Protection and Competition Act of 1992*, in which TBN participated. The Barna Research Group study showed that 6.5 percent of the television stations in America are predominantly programmed with religious material. This study excluded low power television stations since the

circumstances under which such stations will be "must carry" are so scarce they are statistically insignificant. For example, no LPTV station in markets 1 through 160 will ever qualify as a must carry station, and in markets larger than 160 the LPTV station must serve a community that has no full power station within the county. Accordingly, the impact of must carry is really only applicable to full power stations, and of those only 6.5% provide a predominately religious program service—a nominal percentage.

6. The must-carry rules are intended to apply without regard to the program content of free over-the-air television stations. Currently, affiliates of the major broadcast networks, NBC, CBS, ABC and Fox, have also been excluded from carriage by local cable systems. I make this point since the purpose of the Barna Research Group's study, a verified copy of which is attached, was intended only to determine an accurate percentage of free over the air television stations which carry mostly religious programming. In making that determination, the major television networks were excluded since, of my own knowledge, they do not include significant amounts of religious programming. That is not to say, however, that the major television networks are universally carried on all cable systems, since I know they are not. The application of must carry, if it is upheld, applies equally to all broadcast television stations, without regard to program content.

I declare under penalty of perjury the foregoing is true and correct.

Executed February 22, 1993.

By: /s/ Robert D. Higley
ROBERT D. HIGLEY

BARNA RESEARCH GROUP
Limited

February 19, 1993

To Whom It May Concern:

I, George Barna, President and Owner of the Barna Research Group, Ltd., hereby state that the February 11, 1993 letter from Ron Sellers, an employee of Barna Research Group, Ltd., is true and correct to the best of my knowledge and belief. This statement is given on this nineteenth day of February, 1993, by:

/s/ George Barna
GEORGE BARNA

sworn and subscribed to Morgan Schoening, Notary Public this 19th day of February, 1993

/s/ Morgan Schoening
Notary Public, California

BARNA RESEARCH GROUP
Limited

The following figures demonstrate the percentage of commercial broadcast television stations in the United States which carry primarily religious programming.

- Number of commercial TV stations (source: 2/1/93 *Broadcasting* magazine) 1,147
- Number of independent TV stations (source: *1992 TV and Cable Factbook*) 292
- Number of independent stations carrying primarily religious programming (source: 1993 Barna Research Group survey of independent TV stations) 74
- Percentage of all U.S. broadcast television stations which are religious-programming independents 6.5%

Notes:

- Barna Research Group study reached employees of independent TV stations by telephone February, 1993. Of 292 independent stations listed in the *Factbook*, 222 were reached (76%). Programming of unreached stations extrapolated from those which were reached.
- "Independent station" refers to any commercial VHF or UHF broadcast station which is not affiliated with ABC, Fox, CBS, or NBC.
- The Barna Research Group, Ltd. is an independent full-service marketing research firm located in Glendale, CA. Barna Research adheres to recognized survey research techniques, and has considerable experience in research for broadcast and cable clients.
- This report was prepared by project director Ron Sellers, and submitted on the 11th day of February, 1993.

/s/ Ron Sellers
RON SELLERS

(4)

FILED
SEP 7 1993
OFFICE OF THE CLERK

No. 93-45

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Of Counsel:

Marilyn Mohrman-Gillis
Association of America's
Public Television Stations
Suite 200
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-1700

Paula A. Jameson
Nancy Howell Hendry
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314
(703) 739-5000

Thomas E. Harvey
Pamela J. Brown
Corporation for Public
Broadcasting
901 E Street, N.W.
Washington, D.C. 20004
(202) 879-9600

Mark H. Lynch*
Richard W. Buchanan
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting

*Counsel of Record

BEST AVAILABLE COPY

9 pp

QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES iv

MOTION TO AFFIRM 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases **Page**

Employment Division v. Smith,
494 U.S. 872 (1990) 3

Lemon v. Kurtzman, 403 U.S. 602 (1971) 3

Statutes

Cable Television Consumer
Protection and Competition
Act of 1992, 47 U.S.C. § 535 (1992) . . . . . passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-45

NATIONAL INTERFAITH CABLE
COALITION, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

**Appeal From The United States District Court
For The District of Columbia**

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act") does not violate the First Amendment. Section 5 requires cable operators to carry,

with certain important limitations, the signals of noncommercial educational television stations. Section 4 of the 1992 Cable Act, which appellants also challenge, enacts must carry requirements with respect to commercial television stations.

Appellants apparently challenge Sections 4 and 5 under both the Speech and Press Clause and the Establishment and Free Exercise Clause of the First Amendment. With respect to the Speech and Press Clause claims directed at Section 5, the public broadcasters incorporate by reference their Motion To Affirm filed this day in *Turner Broadcasting System, Inc., et al.* v. *Federal Communications Commission, et al.*, No. 93-44 (S. Ct.).[1/] The public broadcasters further submit that appellants' Establishment and Free Exercise Clause claims do not lie against Section 5.

Appellants are cable programmers that produce religious programming for sale to cable operators. Their Religion Clause claims, which were rejected by the district court below, are based on the premise that the must carry provisions of the Cable Act will require cable operators to carry the programming of local religious television stations, thereby reducing the channels available for (and the incentive of cable operators to purchase) appellants' programming. As a result, appellants argue, the must carry provisions violate both the Establishment Clause, by granting "preferential treatment" to local religious television stations, and the Free Exercise Clause, by impeding appellants from reaching their audience and delivering their religious message to viewers. *See* Joint Juris. Statement at 26-28.

[1/] The public broadcasters' Motion To Affirm in *Turner* also contains a detailed Statement that describes the special role of public television in the nation's telecommunications infrastructure, the nature of the cable industry, the history and text of Section 5 of the Cable Act, and the proceedings in the district court below.

With respect to Section 5, however, the premise of appellants' argument is wholly unfounded. By statutory definition, a television station must be qualified to receive grants from the Corporation for Public Broadcasting in order to invoke must carry rights under Section 5. *See* 47 U.S.C. § 535(l)((1)(A)(ii).[2] However, the Corporation's funding criteria prohibit grants for programming "designed to further the principles of religious philosophies." Corporation for Public Broadcasting, Eligibility Criteria for Television Community Service Grants ¶ 7(b) (Aug. 1992). Thus, local religious television stations cannot obtain carriage on cable systems pursuant to Section 5. Indeed, even appellants appear to concede that the only must carry requirements applicable to religious television stations are those contained in Section 4. *See* Joint Juris. Statement at 16 n.9.

In sum, appellants' Religion Clause claims simply do not lie against Section 5. Accordingly, the district court's denial of appellants' Religion Clause challenge to Section 5 should be affirmed.[3]

---

[2] A television station that is "owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes" can also invoke must carry rights under Section 5. § 5(l)(1)(B). As the terms of this provision make clear, however, a local religious broadcaster would not qualify for must carry rights under this part of Section 5.

[3] Even if appellants' Religion Clause claims did lie against Section 5, the district court's decision should nonetheless be affirmed on the merits. As content-neutral economic regulation that imposes only incidental burdens on appellants' programming, Section 5 clearly passes the Establishment Clause standard set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the Free Exercise Clause standard set forth in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

CONCLUSION

For the reasons stated above, and in the public broadcasters' Motion To Affirm filed in *Turner*, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

Of Counsel:

Marilyn Mohrman-Gillis
Association of America's
Public Television Stations
Suite 200
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-1700

Paula A. Jameson
Nancy Howell Hendry
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5000

Thomas E. Harvey
Pamela J. Brown
Corporation for Public
Broadcasting
901 E Street, N. W.
Washington, D.C. 20004
(202) 879-9600

Mark H. Lynch*
Richard W. Buchanan
Covington & Burling
Post Office Box 7566
1201 Pennsylvania
Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for the
Association of America's
Public Television Stations,
Public Broadcasting Service,
and Corporation for Public
Broadcasting

* Counsel of Record

Dated: September 7, 1993

No. 93-45

(5)

FILED
SEP 7 1993
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC. (OPERATING AS THE VISION INTERFAITH SATELLITE NETWORK), ET AL., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
BRUCE G. FORREST
JOHN R. TYLER
SUSAN M. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RENEE LICHT
Acting General Counsel
Federal Communications Commission
Washington, D.C. 20554

BEST AVAILABLE COPY

17 pp

QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, which require cable system operators to devote a portion of their channel capacity to the carriage of commercial broadcast stations and noncommercial educational broadcast stations, violate the Establishment or Free Exercise Clauses of the First Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Board of Educ. v. *Allen*, 392 U.S. 236 (1968)	10
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 113 S. Ct. 2217 (1993)	11
Employment Division, Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990)	5, 11
Hernandez v. *Commissioner of Internal Revenue*, 490 U.S. 680 (1989)	5, 10
Lamb's Chapel v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993)	7, 8
Lee v. *Weisman*, 112 S. Ct. 2649 (1992)	4
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	4, 8
Mueller v. *Allen*, 463 U.S. 388 (1983)	7, 9, 10, 11
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970)	9
Westside Community Bd. of Educ. v. *Mergens*, 496 U.S. 226 (1990)	6, 7, 11
Widmar v. *Vincent*, 454 U.S. 263 (1981)	6, 10
Witters v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986)	7
Zobrest v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993)	6, 7

Constitution and statutes:

U.S. Const. Amend. I	4, 6
Establishment Clause	4, 5, 6, 8, 9, 10
Free Exercise Clause	4, 5, 6, 11
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460:	
§§ 2(a)(2)-(5), 106 Stat. 1460-1461	8

Statutes—Continued: Page

§§ 2(a) (12)-(17), 106 Stat. 1461-1462 9
§ 2(a) (15), 106 Stat. 1462 9
§ 2(b) (1), 106 Stat. 1463 9
§ 2(b) (5), 106 Stat. 1463 9
§ 4, 106 Stat. 1471-1477 (to be codified at 47 U.S.C. 534) 1, 2, 4, 6, 9, 11
106 Stat. 1471, 47 U.S.C. 534(b) (1) (A) .. 2
106 Stat. 1471, 47 U.S.C. 534(b) (1) (B) .. 2
106 Stat. 1471-1472, 47 U.S.C. 534(b) (3) 3
106 Stat. 1472, 47 U.S.C. 534(b) (6) 3
106 Stat. 1473, 47 U.S.C. 534(b) (10) 3
106 Stat. 1473-1474, 47 U.S.C. 534(c) (1) 2
106 Stat. 1476-1477, 47 U.S.C. 534(h) (2) 2
§ 5, 106 Stat. 1477-1481 (to be codified at 47 U.S.C. 535) 1-2, 3, 4, 6, 9, 11
106 Stat. 1478, 47 U.S.C. 535(b) (2) (A) .. 3
106 Stat. 1478, 47 U.S.C. 535(b) (3) (A) .. 3
106 Stat. 1478, 47 U.S.C. 535(b) (3) (B) .. 3
106 Stat. 1478, 47 U.S.C. 535(b) (3) (D) .. 3
106 Stat. 1479, 47 U.S.C. 535(e) 3
106 Stat. 1479-1480, 47 U.S.C. 535(g) 4
106 Stat. 1480, 47 U.S.C. 535(i) 4
§ 6, 106 Stat. 1482-1483 (to be codified as 47 U.S.C. 325):
106 Stat. 1482, 47 U.S.C. 325(b) (1) 3
106 Stat. 1482-1483, 47 U.S.C. 325(b) (3) 3
§ 23, 106 Stat. 1500 (to be codified at 47 U.S.C. 555(c)):
106 Stat. 1500, 47 U.S.C. 555(c) (1) 2
106 Stat. 1500, 47 U.S.C. 555(c) (2) 2
Equal Access Act, 20 U.S.C. 4071 6
28 U.S.C. 2284 2

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-45

NATIONAL INTERFAITH CABLE COALITION, INC. (OPERATING AS THE VISION INTERFAITH SATELLITE NETWORK), ET AL., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

Pursuant to this Court's Rule 18.6, the United States and the Federal Communications Commission move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the district court (J.S. Apps. C-E) is reported at 819 F. Supp. 32.

JURISDICTION

Appellants' challenge to the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act), Pub.

L. No. 102-385, 106 Stat. 1471-1481; 47 U.S.C. 534 and 535,[1] was heard by a three-judge district court convened pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(1), and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Section 4 of the 1992 Act adopts a limited must-carry obligation generally applicable to local commercial broadcast stations. A cable system with more than 300 subscribers but 12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A). For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[2] In general, a cable operator must retransmit, in its entirety, the programming of a

[1] Citations to the United States Code relating to the provisions of the 1992 Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

[2] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in the channel position in which it is presently carried or was carried at specified times in the past. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).[3]

For local noncommercial educational stations, Section 5 of the 1992 Act imposes similar requirements. Thus, a cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such stations, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Act requires a cable operator, in some circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations receiving carriage. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Act requires cable operators to

---

[3] The 1992 Act provides that commercial broadcast stations may elect not to invoke the must-carry requirements, in which case they may withhold consent to retransmit their programming. See § 6, 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). If a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated.

carry the entire programming schedule of noncommercial educational stations, imposes channel positioning requirements, and limits payments allowable for the signals of noncommercial educational stations. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

2. Appellants are religious groups that disseminate programming through carriage on cable systems. J.S. App. C26-C27; J.S. 7-11. Soon after the 1992 Act was enacted, appellants in *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44, filed five consolidated actions challenging the constitutionality of Sections 4 and 5 of the 1992 Act on the ground that they violate the First Amendment's guarantee of free speech and freedom of the press.[4] Appellants in this case intervened to challenge the must-carry requirements on the ground that they violate the Establishment and Free Exercise Clauses of the First Amendment. In particular, appellants maintained that the must-carry provisions impermissibly favor religious broadcasters over religious cable programmers. J.S. App. C26-C27.

The district court rejected appellants' Establishment Clause claim under the "now familiar" framework of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which requires that the government's conduct "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." J.S. App. C27 (quoting *Lee* v. *Weisman*, 112 S. Ct. 2649, 2654 (1992)). Applying that stand-

---

[4] Appellants in this case have adopted by reference the arguments of appellants in No. 93-44. We are providing appellants in No. 93-45 a copy of our motion to affirm in that case.

ard, the district court found that the must-carry provisions comply with the Establishment Clause. First, the court concluded that the must-carry provisions "clearly reflect a secular purpose." J.S. App. C28. It found nothing in the record to indicate that Congress intended to favor religious broadcasters over cable programmers or even that Congress was aware that broadcasters and cable programmers deliver different religious messages. *Ibid.* Second, the court held that because the must-carry provisions "apply to all broadcasters, without regard to whether their programming contains any religious fare at all," the primary effect of the statute was neither to advance nor inhibit religion. J.S. App. C28. Third, emphasizing that the must-carry provisions do not call for " 'detailed monitoring and close administrative contact' between the government and sectarian organizations," the court determined that they do not result in excessive government entanglement with religion. *Id.* at C29 (quoting *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 697 (1989)).

Finally, the district court rejected appellants' Free Exercise challenge to the 1992 Act, holding that any burden on appellants' religious practice was "merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." J.S. App. C29 (citing *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990)).

ARGUMENT

The must-carry provisions of Sections 4 and 5 of the 1992 Act constitute religion-neutral economic legislation designed to address market dysfunction in the video communications market and to ensure that consumers receive a diversity of programming. Those provisions are applicable to all cable operators and over-the-air broadcasters and do not favor some religious speakers over others. The district court correctly determined that the must-carry provisions do not violate the Establishment Clause or Free Exercise Clause of the First Amendment.

1. The must-carry provisions of the 1992 Act are constitutional under this Court's precedents holding that the Establishment Clause is not violated by a "neutral[]" governmental program that benefits "a broad class of citizens without reference to religion," merely because sectarian institutions also may incidentally be benefitted. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993). For example, in *Widmar* v. *Vincent*, 454 U.S. 263, 270-271 (1981), this Court held that a public university may constitutionally adopt an "equal access" policy that opens its facilities to "religious groups and speakers on the terms available to other groups." And in *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990), the Court held that the Establishment Clause is not violated where a religious group benefits from the Equal Access Act, 20 U.S.C. 4071, which prohibits state secondary schools having a "limited open forum" from denying "equal access" to groups on the basis of "the religious, political, philosophical or other content" of their speech. See 496 U.S. at 248-253 (plu-

rality opinion); *id.* at 260-262 (Kennedy, J., concurring in part and concurring in the judgment).[5]

The must-carry provisions easily satisfy the requirements found crucial in those cases. The must-carry provisions require the carriage of local broadcasting stations without regard to the programming they carry (J.S. App. C15), and the provisions are therefore generally available to all broadcasting stations without regard to the sectarian or nonsectarian nature of the programming that is carried. See, *e.g.*, *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 398. For that reason, moreover, the must-carry requirements provide no governmental incentive to engage in religious broadcasting, and are not skewed toward religion. See *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 487. And if a broadcaster carried under the must-carry requirements engages in religious broadcasting, that is "a result of the genuinely independent and private choices" of the broadcaster. *Witters*, 474 U.S. at 487. Thus, the must-carry provisions constitute a

---

[5] For other cases applying that principle, see, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (use of school property for public showing of religious film after school hours permissible where property used for wide variety of organizations and no school sponsorship involved); *Zobrest*, 113 S. Ct. at 2466-2469 (funding interpreter for hearing-impaired child attending religious school merely provides incidental benefit to religion); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487-488 (1986) (vocational assistance under general state program may be used by recipient for religious as well as secular higher education); *Mueller* v. *Allen*, 463 U.S. 388, 398-403 (1983) (state tax credit for educational expenses, available to all parents, may be used for parents whose children attend sectarian schools).

neutral government program that assists local broadcasting stations (and, hence, their viewers) and has only an incidental effect on religion.

Consideration of the framework of *Lemon* v. *Kurtzman*, *supra*, confirms that the must-carry provisions are constitutional. Under that framework, three factors are relevant:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the statute must not foster an excessive government entanglement with religion.

403 U.S. at 612-613 (citations and quotations omitted). As this Court has explained, satisfaction of those three criteria assures that a legislative enactment does not contravene the Establishment Clause. See, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993). The must-carry provisions of 1992 Act are consistent with each of those criteria.

First, the 1992 Act was enacted with the explicit purpose of addressing market failure in the cable industry and providing a wide diversity of programming and information to viewers. As Congress's extensive findings of fact indicate (see §§ 2(a)(2)-(5), 106 Stat. 1460-1461), the cable industry, which serves more than 60 percent of the households with televisions, is highly concentrated and is characterized by substantial vertical integration. Cable operators, moreover, increasingly compete with local broadcasters for audiences and advertising revenues, and they accordingly have an economic incentive to drop broadcasters or reposition them to disadvan-

tageous channels. §§ 2(a)(12)-(17), 106 Stat. 1461-1462. As a result, Congress enacted the must-carry provisions, *inter alia*, to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" and to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." §§ 2(b)(1) and (5), 106 Stat. 1463. No indication of anything but a secular purpose appears either on the face of the statute or in the legislative record. See J.S. App. C28.[6]

Second, the primary effect of Sections 4 and 5 of the 1992 Act is to require the devotion of a limited portion of cable channel capacity to the carriage of local broadcasters, without regard to the content of their particular programming. Appellants nevertheless argue (J.S. 29-39) that the must-carry provisions of the 1992 Act run afoul of the "primary effect" requirement because they require carriage of the speech of religious broadcasters. A generally applicable statute, however, does not offend the Establishment Clause simply because it benefits religious interests or activities in a manner incidental to the secular purpose of the legislation. See, *e.g.*, *Mueller*, 463 U.S. at 398-403 (tax deduction for children's educational expenses usable for religious as well as secular schools); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672-680 (1970) (general tax exemption available for religious as well as other non-profit groups). "If the Establishment Clause barred the extension of gen-

---

[6] Contrary to appellants' assertion (J.S. 33), Congress did not refer to "religious" broadcasters in § 2(a)(15) of the 1992 Act, 106 Stat. 1462. Appellants' quotation of the statute errs in adding the word "religious" to the text.

eral benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its sidewalk kept in repair.'" *Widmar*, 454 U.S. at 274-275 (citations omitted). In the absence of any "empirical evidence" that religious broadcasters "will dominate" the carriage provisions of the 1992 Act, the advancement of religion will not be their primary effect. *Id.* at 275; see *id.* at 274 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect").

Third, the must-carry provisions of the 1992 Act result in no "excessive entanglement" of the government in religious affairs. That concern is not implicated when the government program, as here, merely calls for "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies." *Hernandez*, 490 U.S. at 696-697 (citations omitted). Because the 1992 Act imposes carriage requirements upon the cable operator without regard to the content of the local broadcasting to be carried, the must-carry provisions do not require any government oversight of, or involvement with, any sectarian organizations whose programming may be carried. When measured against a variety of circumstances found acceptable by this Court under the "excessive entanglement" standard, the must-carry requirements readily satisfy the requirements of the Establishment Clause. See, e.*g.*, *Board of Educ.* v. *Allen*, 392 U.S. 236, 244-245 (1968) (loan of state textbooks to religious school students must be approved as secular); *Mueller*, 463 U.S. at 403 (state tax deductions for secular texts

used in religious schools requires officials to determine which texts are secular and which are religious).

2. Appellants contend that Sections 4 and 5 of the 1992 Act violate the Free Exercise Clause because their religious programming will in many cases be dropped from cable systems as they comply with the must-carry requirements. J.S. 39-46. But to the extent the 1992 Act may burden appellants' religious activity, any such burden is an incidental effect of a facially neutral law, applied to all cable operators and all broadcasters generally. Congress did not address religious groups or target religion in any way in enacting this generally applicable legislation. Hence, it does not offend the Free Exercise Clause of the First Amendment. See *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872, 878-880 (1990); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S. Ct. 2217, 2226-2233 (1993) (local ordinances adopted to target religious practices invalid under the Free Exercise Clause because not neutral or generally applicable).[7]

---

[7] Appellants also argue (J.S. 49) that the 1992 Act impermissibly intrudes on cable operators' rights by requiring them to carry a religious message selected by the government. In appellants' view, that requirement implies government endorsement of the religious message. As we explain in our motion to affirm in *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44, the must-carry provisions do not impermissibly compel speech on the basis of its content. In any case, because the must-carry provisions apply "to a broad class of nonreligious as well as religious speakers," they "do[] not 'confer any imprimatur of state approval.'" *Mueller*, 463 U.S. at 397; see also *Mergens*, 496 U.S. at 252 (plurality opinion) ("broad spectrum" of clubs at secondary school "counteract[s] any possible message of official endorsement of or preference for religion or a particular religious belief").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
BRUCE G. FORREST
JOHN R. TYLER
SUSAN M. DAVIES
Attorneys

RENEE LICHT
Acting General Counsel
Federal Communications Commission

SEPTEMBER 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 86013

Supreme Court, U.S.
FILED
SEP 15 1993
OFFICE OF THE CLERK

No. 93-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the VISION INTERFAITH SATELLITE
NETWORK and ATLANTA INTERFAITH
BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and
the UNITED STATES OF AMERICA,

Appellees.

On Appeal from Three-Judge Court
United States District Court of Columbia

JOINT REPLY TO MOTIONS TO AFFIRM

Steven J. Hyman
(Counsel of Record)
Robert I. Freedman
Janet C. Neschis
Paul H. Levinson
Leavy, Rosensweig & Hyman
Counsel for
National Interfaith
Cable Coalition, Inc.
11 East 44th Street
New York, New York 10017
(212) 983-0400

James H. Johnston
Counsel for
Atlanta Interfaith
Broadcasters, Inc.
Suite 1000
1133 Connecticut
Avenue NW
Washington, D.C. 20036
(202) 659-1911

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

10PP

TABLE OF CONTENTS

	Page(s)
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Board of Ed. of Westside Com. Schools v. Mergens, 496 U.S. 226 (1990)	4, 5
Bowen v. Kendrick, 487 U.S. 589 (1988)	3, 4
Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	3
County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989)	5
Hunt v. McNair, 413 U.S. 734 (1973)	3
Lambs Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993)	4
Lee v. Weisman, 112 S.Ct. 2649 (1992)	4, 5
Lemon v. Kurtzman, 403 U.S. 602 (1971)	2-6
People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948)	3
Pruneyard Shopping Center v. Robins, 447 U.S.74 (1980)	4
School District of Grand Rapids v. Ball, 473 U.S. 373 (1985)	3
Tilton v. Richardson, 403 U.S. 672 (1971)	3
Widmar v. Vincent, 454 U.S. 263 (1981)	4
Wooley v. Maynard, 430 U.S. 705 (1977)	4, 5
Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993)	3

Statutes:

	Page(s)
Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1471-1481, 47 U.S.C. §§ 534 and 535	1, 3

ARGUMENT

Appellants, National Interfaith Cable Coalition, Inc. ("NICC") operating as the Vision Interfaith Satellite Network ("VISN") and Atlanta Interfaith Broadcasters, Inc. ("AIB"), reply to the Motions to Affirm by Appellees Federal Communications Commission and United States ("Federal Respondents"), Trinity Christian Center of Santa Ana, Inc. *et al.* ("Trinity"), Corporation for Public Broadcasting ("CPB"), and National Association of Broadcasters.

This is a direct appeal from a three-judge district court decision on summary judgment that, among other things, rejected Appellants' challenge to the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), Pub. L. No. 102-385, 106 Stat. 1471-1481, 47 U.S.C. §§ 534 and 535, under the Establishment and Free Exercise of Religion Clauses of the First Amendment.

The challenged must-carry provisions require cable television system operators to devote up to one third of their channel capacity to the carriage of local broadcast television stations. The seventy-four full power commercial stations that broadcast predominantly religious programming comprise twenty-five percent of the independent or non-network stations that are entitled to carriage under the Cable Act. There are additional religious noncommercial and low power stations that have must-carry rights.

Appellee Trinity typifies the religious broadcasters. Through its satellite network, Trinity provides to its stations, as well as unaffiliated broadcasters, evangelical and charismatic Christian programming fare. With must-carry, Trinity's programming will squeeze out competing religious programming on cable and will reach into eighty percent of American households.

Appellants NICC and AIB, in contrast, provide "interfaith" — Christian, Jewish, and Moslem — programming to cable television systems via satellite and microwave signals respectively. The Cable Act only requires that "broadcast" television stations be carried. Thus, neither of the Appellants has the Congressionally-mandated right to carriage that Trinity and other religious broadcast television stations have. And, neither will have a reach that remotely compares to Trinity's.

Because there are significant numbers of religious television stations and because they are given valuable, preferred rights of access to cable subscribers, this appeal raises novel questions of whether Congress through the Cable Act has unconstitutionally provided substantial subsidies and aid to pervasively sectarian institutions, denied equal access to other religious programmers, and engaged in coercion and endorsement in connection with the dissemination of religious messages.

Appellees characterize this case as one of settled law that involves routine application of the so-called *"Lemon* test," *Lemon v. Kurtzman*, 403 U.S. 602 (1971). They argue that the Cable Act easily passes muster under *Lemon* because it is facially neutral, requiring carriage of all local broadcast stations whether religious or secular, because its secular purpose was to increase programming diversity, and because it requires no excessive government entanglement with religion.

Appellees would confine this appeal to *Lemon* in order to avoid the true issues. They discuss precedents concerning buildings and books, while ignoring the fact that the must-carry provisions were intended to, and do in fact, control speech, including religious speech. Trinity diverts attention from the fact that it alone stands to gain access to thirty six million new viewers and potential contributors from must-carry by saying that the statute confers only "incidental" benefits on religion.

Appellants raise three issues; none of which is resolved by *Lemon* and subsequent cases relied on by Appellees.

First, it is undeniable — and Appellees do not deny— that the must-carry provisions subsidize local broadcast stations. Trinity, as an example, is here to protect its subsidy, a subsidy that was expressly intended. Congress said it wanted to divert advertising revenue away from cable-only programmers and to local broadcasters for the purpose of preserving local broadcasting. Judge Williams in his dissent to the district court decision focused on Congress's desire to subsidize local broadcasters and suggested that it might have avoided problems under the Free Speech provisions of the First Amendment if it had used outright financial aid instead of must-carry rights.

Lemon notwithstanding, this Court has never validated such aid to pervasively sectarian institutions where the aid directly advanced a religious message. *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

Appellees carry *Lemon* to the extreme, implying that as long as the Cable Act has a secular purpose and is neutral on its face it is constitutional. Under their analysis, unrestricted government grants to parochial schools would be constitutional provided that the funding statute applied to public and private schools and did not specifically reference parochial schools.[1]

---

[1] Congress certainly knew that must-carry would aid religious stations. CPB suggests that because CPB bars noncommercial religious stations from receiving public funds, Congress made the stations ineligible for must-carry under Section 5 (47 U.S.C. §535). In fact, religious noncommercial stations have the enhanced must-carry rights of commercial stations under Section 4 (47 U.S.C. §534), and successfully lobbied for this result.

The Court has unanimously rejected such an extension of *Lemon*. *Bowen v. Kendrick*, 487 U.S. 589.

The aid given to religious broadcasters is not exclusively financial. Must-carry gives them a far wider viewership for proselytizing as evidenced by Trinity's gaining a potential thirty six million new viewers by virtue of the must-carry provisions.

Second, Appellees avoid completely the equal access issue. They cannot reconcile the district court decision with this Court's precedents. The Court has held that, consistent with *Lemon*, government must give religious speech equal access in government-controlled forums. *Lambs Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *Board of Ed. of Westside Com. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Court, however, has not addressed the corollary issue, which is raised in this appeal, of whether the failure to provide equal access to all religious groups is constitutional or not. It has expressly left open "questions that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." *Widmar*, 454 U.S. 263, 274 n.13. Because capacity of the cable forum is limited, Congressionally-mandated carriage of religious broadcast stations necessarily denies access by other religious programmers.[2]

---

[2] In their Motion to Affirm at 28 in companion appeal No. 93-44, Federal Respondents observe "this case is more closely analogous to Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)...." There a California law that required a private shopping mall to be open to political speech as a public forum was held constitutional under the Free Speech Clause. The Court did not consider whether private citizens, under the Religion Clauses, must also disseminate religious messages. In later cases, the Court has rejected such coercion in connection with religious messages. Lee v. Weisman, 112 S.Ct. 2649 (1992); Wooley v. Maynard, 430 U.S. 705 (1977); see also, Board of Ed. of Westside Com. Schools v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J. concurring).

The presence of religious litigants on opposite sides of this appeal underscores the equal access issue. Appellants are non-profit organizations that make available national and local, interfaith, religious programming to cable systems. They compete for cable carriage with each other as well as with local religious broadcast stations. But while Appellants provide programming for all faiths, broadcast stations, such as those affiliated with Trinity, program primarily for fundamentalist Christian viewers.

The Cable Act gives Trinity such a decided preference over Appellants and other religious programmers in accessing cable subscribers that as a practical matter it "establishes" Trinity's brand of religious programming.

Third, Appellees ignore the religious coercion and endorsement inherent in the Cable Act. They have cited no precedent — for there is none — to support the proposition that Congress may require private citizens to disseminate religious messages under penalty of law. While government may constitutionally tolerate religious activity on its property, its action becomes unconstitutional if there is the slightest suggestion of government coercion concerning, or government endorsement of, religious beliefs. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Wooley v. Maynard*, 430 U.S. 705 (1977).

As the very name suggests, "must-carry" is patently coercive, and the Court has been careful to examine separately the question of coercive government support or endorsement of religion when applying the *Lemon* test. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Board of Ed. of Westside Com. Schools v. Mergens*, 496 U.S. 226, 251; *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.

Religious broadcast stations need the government's help, in the form of must-carry, to secure cable carriage. Almost without exception, cable operators refused to carry the religious broadcast stations prior to the Cable Act, although they carried Appellants' interfaith offerings.

In sum, the Cable Act gives substantial financial subsidies and other aid to pervasively sectarian institutions to further their religious missions; it mandates a scheme of unequal access to cable subscribers by religious programmers; and, it coerces private cable operators into disseminating religious messages. Appellees' arguments that the district court was correct in finding *Lemon* dispositive are unresponsive to these issues. *Lemon* does not attempt to answer these questions. The Court has never sustained such violations of the Religion Clauses.

CONCLUSION

For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

Steven J. Hyman
(Counsel of Record)
Robert I. Freedman
Janet C. Neschis
Paul H. Levinson
Leavy, Rosensweig & Hyman
Counsel for
National Interfaith
Cable Coalition, Inc.
11 East 44th Street
New York, New York 10017
(212) 983-0400

James H. Johnston
Counsel for
Atlanta Interfaith
Broadcasters, Inc.
Suite 1000
1133 Connecticut
Avenue NW
Washington, D.C. 20036
(202) 659-1911

93-45

Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.,
operating as the
VISION INTERFAITH SATELLITE NETWORK, *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO AFFIRM

BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
DONALD B. VERRILLI, JR.
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

HENRY L. BAUMANN
BENJAMIN F. IVINS
JACK N. GOODMAN
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430
Counsel for National Association of Broadcasters

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

5 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	2

TABLE OF AUTHORITIES

Statutes Page

United States Code

47 U.S.C. § 531 1
47 U.S.C. § 534 1
47 U.S.C. § 535 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-45

NATIONAL INTERFAITH CABLE COALITION, INC., operating as the VISION INTERFAITH SATELLITE NETWORK, *et al.*, *Appellants*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Appellees*.

MOTION TO AFFIRM

Appellee National Association of Broadcasters ("NAB") representing commercial broadcast stations nationwide, respectfully moves to affirm the judgment of a three-judge district court rejecting a First Amendment Establishment and Free Exercise challenge to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531 *et seq.* (the "Act"), which requires cable operators to carry the signals of a limited number of local commercial television stations.[1]

STATEMENT OF THE CASE

NAB adopts and incorporates herein the statement of the case articulated by the Federal Communications Com-

---

[1] Section 4 is codified at 47 U.S.C. § 534. The other "must carry" provision—Section 5, 47 U.S.C. § 535—requires cable operators to carry the signals of certain *noncommercial* educational television stations. NAB does not address that provision.

NAB was granted leave to intervene as a defendant below. *See* Appendix to the Jurisdictional Statement in No. 93-44 at 3a.

mission and the United States of America in their joint motion in this case.

ARGUMENT

For the reasons stated by the Federal Communications Commission and the United States of America in their motion, plenary review is unwarranted because the district court correctly applied settled principles in upholding Section 4.

CONCLUSION

The judgment of the three-judge district court should be summarily affirmed.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
DONALD B. VERRILLI, JR.
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

HENRY L. BAUMANN
BENJAMIN F. IVINS
JACK N. GOODMAN
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430
Counsel for National Association of Broadcasters

* Counsel of Record